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1948

[Vol. 35]

EAST PUNJAB SECTION

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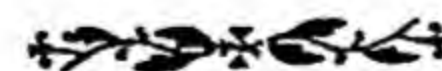
- (1) 49 CRIMINAL LAW JOURNAL (2) 50 PUNJAB LAW REPORTER



CITATION : A. I. R. (35) 1948 EAST PUNJAB



PUBLISHERS
THE ALL INDIA REPORTER LTD.
NAGPUR, C. P.
1948



Printed by L. MELA RAM, at the All India Reporter Press, Nagpur, and Published by
D. V. CHITALEY, B.A., LL.B., Advocate, for the All India Reporter Ltd., at
Congress Nagar, Nagpur.

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EAST PUNJAB HIGH COURT

1948

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PUISNE JUDGES :

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" " Sardar Bahadur Teja Singh, B.A., LL.B.
" " Shri Amarnath Bhandari, I.C.S.
" " " Achhru Ram, B.A., LL.B.
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THE ALL INDIA REPORTER 1948

East Punjab High Court

[C. N. 1.]

A. I. R. (35) 1948 East Punjab 1

TEJA SINGH AND ACHHRU RAM JJ.

Amolak Chand-Mewa Ram — Appellant v. Mohammad Shafi, Plaintiff and others, Defendants—Respondents.

Second Appeal No. 2159 of 1945, Decided on 18-12-1947, from decree of District Judge, Delhi, D/-23-6-1945.

(a) Civil P. C. (1908), O. 21. Rr. 91 and 93—After confirmation of sale, judgment-debtor discovered to have no saleable interest—Auction-purchaser can maintain suit for refund of price.

Where purchaser at an auction sale held in execution of a money decree had, after the confirmation of the sale in his favour, to part with possession of the property purchased by him by reason of the paramount title of another claimant, it being found that the judgment-debtor had no saleable interest in the property sold in the absence of any equitable considerations disentitling him to the relief, he can maintain a suit for the refund of the price paid by him: 19 A. I. R. 1932 Lah. 401 (F. B.); 17 A. I. R. 1930 Oudh 148 (F. B.) and 23 A. I. R. 1936 Mad. 50 (F. B.), *Foll.*; 25 A. I. R. 1938 All. 593 (F. B.), *Dissent.* [Paras 4 & 7]

Annotation.—('44-Com.) Civil P. C. O. 21 R. 93 N. 4.

(b) Limitation Act (1908), Arts. 62 and 120 — After confirmation of auction-sale, judgment-debtor discovered to have no saleable interest in property sold—Suit by auction-purchaser for refund of price is governed not by Art. 62 but by 120.

While it is true that in order to attract the application of Art. 62 it is not necessary that the defendant should, when receiving money, intend to pay it to the plaintiff, and the Article has been applied even in cases where the money was received by the defendant under an adverse and hostile claim, the application of the Article has never been extended to cases in which the original receipt of the money by the defendant could not be deemed to be either in fact or by operation of law as a receipt on behalf, or for the use, of the plaintiff. The Article has been never applied to cases in which, by reason of some subsequent events, the money, which was initially paid to the defendant for his own use, was to be regarded as in law money received by him for the plaintiff's use. [Para 8]

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Hence where after the confirmation of an auction-sale it is discovered that the judgment-debtor had no saleable interest in the property sold, a suit by the auction-purchaser for refund of the price paid by him is governed not by Art. 62 but by Art. 120: 10 A. I. R. 1923 Cal. 85, 16 Mad. 361 and 35 All. 419, *Rel. on*; 22 A. I. R. 1935 Mad. 354, *Dissent.* [Para 8]

Annotation.—('42-Com.) Limitation Act, Art. 62, N. 19.

Cases referred :—

1. ('32) 13 Lah 618 : 19 A. I. R. 1932 Lal 401 : 138 I. C. 47 (F. B.), *Mehr Chand v. Milkhi Ram.*
2. ('30) 5 Luck 552 : 17 A. I. R. 1930 Oudh 148 : 124 I. C. 641 (F. B.), *Bahadur Singh v. Ram Phal.*
3. ('36) 59 Mad. 202 : 23 A. I. R. 1936 Mad 50 : 159 I. C. 625 (F. B.), *Macha Goundan v. Kottora Koundan.*
4. ('38) 25 A. I. R. 1938 All. 593 : I. L. R. (1938) All. 922 : 178 I. C. 1 (F. B.), *Amar Nath v. Firm Chotelal Durgaprasad.*
5. ('23) 50 Cal. 115 : 10 A. I. R. 1923 Cal. 85 : 70 I. C. 606, *Makar Ali v. Surfuddin.*
6. ('93) 16 Mad. 361, *Nilakanta v. Imam Sahib.*
7. ('13) 35 All. 419 : 19 I. C. 986, *Sidheswari Prasad Narain Singh v. Mayanand Gir.*
8. ('84) 10 Cal 860 : 11 I. A. 59 : 4 Sar. 548 (P. C.), *Gurudas Pyne v. Ram Narain Sahu.*
9. ('31) 58 I. A. 1 : 18 A. I. R. 1931 P. C. 9 : 8 Rang 645 : 130 I. C. 609 (P. C.), *Annamalai Chettiar v. Muthukaruppan Chettiar.*
10. ('46) I. L. R. (1946) Mad. 311 : 32 A. I. R. 1945 Mad. 462, *Gopalaswami Naick v. Province of Madras.*
11. ('35) 22 A. I. R. 1935 Mad. 354 : 159 I. C. 750, *Sivaramaraju v. Secretary of State.*

D. N. Aggarwal—for Appellant.

Bishan Narain—for Respondents.

Achhru Ram J. — This second appeal has arisen in the following circumstances. The house in dispute belonged to Ranglal, defendant 1. He sold the same to one Pt. Jai Dev Sharma and others by means of a sale deed dated 20th November 1936. On 22-11-1936, firm Amolak Chand Mewa Ram appellants in the present second appeal and defendant 5 in the suit, out of which this appeal has arisen, attached the said house in execution of a simple money-decree obtained

by them against the aforesaid Rang Lal. Jai Dev Sharma and the other purchasers objected to the attachment under O. 21, R. 58, Civil P. C. but their objections were disallowed by the executing Court. They then filed a suit under O. 21 R. 63, Civil P. C., to establish their title to the attached house. The firm Amolak Chand-Mewa Ram, the attaching decree-holders, withdrew the attachment and allowed the suit under O. 21 R. 63, Civil P. C., brought by Jai Dev Sharma and others to be decreed on 12th November 1937. In the meanwhile, on 24th February 1937, Captain Sardar Surendar Pal Singh, defendant 2 in the suit giving rise to this appeal, had sued out execution of his simple money decree against the aforesaid Rang Lal by attachment of the same house. The attachment was effected on 19th March 1937 and on 11th June 1937 an order was made for the sale of the attached house. Firm Amolak Chand-Mewa Ram and some other decree-holders of Rang Lal applied for execution of their respective decrees by rateable distribution of the assets to be received on the sale of the house. Objections filed by Pt. Jai Dev Sharma and his co-vendees under O. 21, R. 58, Civil P. C., were disallowed by the executing Court. After the disallowance of these objections the house was sold on 3rd July 1937 and was purchased by Mohammad Shafi plaintiff for a sum of Rs. 2,200. The sale proceeds after deduction of the auctioneer's commission were rateably distributed amongst the various decree-holders, firm Amolak Chand-Mewa Ram getting Rs. 666-10-0 as their rateable share. Some time after the sale, Jai Dev Sharma and his co-purchasers brought a suit under O. 21, R. 63, Civil P. C., for a declaration that the house was not liable to attachment and sale in execution of the decree of defendant 2 against Rang Lal, defendant 1. The suit of Jai Dev Sharma and others was decreed by the first Court on 10th July 1938. The decree was affirmed on appeal by the District Judge and a second appeal from the said decree filed in the High Court also was dismissed on 21st April 1943. After having exhausted his remedies by way of appeal and second appeal the plaintiff brought the suit, out of which this second appeal has arisen, for a refund of the sale price on the ground that the judgment-debtor had, at the time of the sale in his favour, no saleable interest in the house in dispute. He alleged that Captain Sardar Surendar Pal Singh defendant 2, was responsible for the refund of the whole of the sale price, including the commission paid to the auctioneer, because it was due to fraudulent representations, made by him that the plaintiff was induced to purchase the property. In the alternative it was claimed that

each of the decree-holders who had got rateable distribution must be made to refund the amount received by such decree-holder by way of such rateable distribution. The learned Subordinate Judge, who tried the suit, granted the plaintiff a decree for recovery of a sum of Rs. 2090 out of the sale price, paid by him, holding each of the decree-holders defendants responsible for the amount received by such decree-holder by way of rateable distribution. Defendant 5 who had been held liable for a sum of Rs. 655-10-, alone appealed to the learned District Judge from the decree of the learned Subordinate Judge, but without success. He has come up in second appeal to this Court.

[2] The learned trial Judge found against the plaintiff in so far as his contention as to defendant 2 being guilty of fraud or collusion or of making false representations was concerned. He, however, held that the plaintiff was entitled to the refund of the price paid by him by reason of the judgment-debtor having no saleable interest at all in the house sold.

[3] Before the learned District Judge the decision of the learned Subordinate Judge was contested only on two grounds, namely, (1) that an auction-purchaser of property in which the judgment-debtor is discovered to have had no saleable interest at the time of the execution sale has no remedy except that given to him by the provisions of O. 21, Rr. 91 and 93, Civil P. C., and that if he fails to apply for the setting aside of the sale under R. 91 and for refund of the sale price under R. 93, he can claim no relief in respect of the price paid by him and (2) that the learned trial Judge wrongly applied Art. 120, Limitation Act to the suit and erroneously held the same to be within limitation, the suit being really governed by Art. 62, Limitation Act and having been brought much more than 8 years after the receipt of the money by the appellant, being hopelessly barred by time. The learned District Judge overruled both these contentions of the appellant. In arguing the present second appeal Mr. D. N. Aggarwal contested the correctness of the decision on both these points.

[4] In so far as the competency of the plaintiff to sue for refund of the sale price is concerned, the matter is concluded by a Full Bench judgment of the Lahore High Court in 13 Lah. 618.¹ In that judgment after a review of all the relevant authorities it was held that where purchaser at an auction sale held in execution of a money decree had after the confirmation of the sale in his favour, to part with possession of the property purchased by him by reason of the paramount title of another claimant, it being found that the judgment debtor in execution of a decree against whom the property was sold

had no saleable interest therein, in the absence of any equitable considerations disentitling him to the relief, can maintain a suit for the refund of the price paid by him. Jai Lal J., who wrote the judgment of the Full Bench dealt most exhaustively with all the decided cases that had taken a contrary view.

[5] Before the matter came up for consideration before the Full Bench of the Lahore High Court, a Full Bench of the Chief Court of Oudh had also taken a similar view in 5 Luck. 552.² More recently the question came up for consideration before a Full Bench of the High Court of Madras in 59 Mad. 202.³ Ramesam J., who wrote the judgment of the Full Bench agreeing with the view taken by the High Court of Lahore held that where a mortgage decree and the sale of the mortgaged property in execution of the mortgage decree are held, in a suit filed by a third party subsequent to the confirmation of the sale, to be not binding on the third party, and, as a consequence thereof, the auction-purchaser loses possession of the property, he has a right to recover back the purchase money from the decree-holder by a separate suit.

[6] The learned counsel for the appellant relied mainly on the judgment of a Full Bench of five Judges of the Allahabad High Court in A. I. R. 1938 ALL. 593.⁴ I have perused this judgment with all the care and respect which was due to the learned Judges constituting the Bench, but, with the utmost deference to the opinion expressed by those learned Judges I can see no ground at all for not following the view taken by the Lahore Full Bench, supported as it is by the pronouncements of the Full Benches of the Madras and the Oudh Courts. There is no argument in the Allahabad judgment which has not been examined in the three Full Bench judgments mentioned above and there is no important reported case referred to there which has not been dealt with in those judgments and it will be an act of supererogation on my part to reiterate what has been said in those judgments with regard to those arguments and those decisions. I, therefore, need only express my respectful agreement with the view of law taken in the aforesaid Full Bench decisions.

[7] It is true that as pointed out by their Lordships of the Judicial Committee several times, it is of the essence of a Code to be exhaustive but a Code is presumed to be exhaustive only on matters with which it actually deals. Regarding the matters not actually dealt with by it, a Code has never been regarded to be exhaustive. There is a large body of decisions in which the Courts have held the Civil Procedure Code not to be exhaustive and have acted upon the assumption of the possession by them of an

inherent power to act *ex debito justitiæ* to do that real and substantial justice for the administration of which alone they exist. Section 315, Civil P. C. of 1882, which has now been replaced by R. 93 of O. 21, contained a provision to the effect that when it was found that the judgment-debtor had no saleable interest in the property which was purported to be sold and the purchaser was for that reason deprived of it, such a purchaser was entitled to receive back his purchase money from any person to whom the same had been paid, and it was further provided in the aforesaid section that the repayment of the said purchase money could be enforced against such person in the same manner as was laid down by the Code for the execution of a decree for money. While the aforesaid section was in force, it was held that the remedy given to the auction-purchaser thereby was not his only remedy, and that he was not debarred from bringing a suit for the recovery of the purchase money if he had failed to avail himself of the remedy provided by that section. Under the Code of 1908, it is only where the sale has been set aside on an application made by the auction purchaser under R. 91, for the setting aside of the sale on the ground of the judgment-debtor having no saleable interest in the property which was purported to be sold that he can move the executing Court for a refund of his purchase money. This Code contains no provision at all for a case in which the auction purchaser by reason of being ignorant of the judgment-debtor having no saleable interest in the property purported to be sold or for any other reason is not able to move the executing Court to set aside the sale under R. 91. If under the Code of 1882, which conferred on such an auction purchaser a very general remedy for claiming the refund of the purchase price paid by him was held not to take away his common law right of maintaining a suit for the recovery of the sale price on the ground of the total failure of consideration, much less can the present Code be held to take away that right, when we find that the remedy given to the auction purchaser by that Code is of a much more limited character and can be availed of only in a very limited number of cases and not generally. To hold otherwise would mean that where the auction purchaser gets possession of the property purchased by him believing in good faith that the judgment-debtor had a saleable interest therein and is ousted by a person having a paramount title long after the expiration of the period prescribed for an application to set aside the sale on the ground of the judgment-debtor having no saleable interest in the property sold, is left entirely without any remedy and must lose both the

property and the money paid by him at the execution sale. Such an inequitable and unjust result could not have been contemplated by the Legislature. In my opinion, therefore, the change in the language of the Code was not intended to take away from an auction purchaser who in an execution sale has paid good money for property in which the judgment-debtor is subsequently discovered to have no saleable interest, the remedy for getting refund of the sale price by means of a suit which was fully recognised by all the Courts in cases arising under the old Code.

[8] Coming now to the question of limitation, after giving due weight to the arguments addressed to us at the bar, I am of the opinion that the two Courts below have come to a correct conclusion in holding that the suit is governed by Art. 120 and not by Art. 62. Article 62 provides that a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use must be brought within three years from the date when the money is received by the defendant. While it is true that in order to attract the application of the aforesaid article it is not necessary that the defendant should, when receiving money, intend to pay it to the plaintiff, and the article has been applied even in cases where the money was received by the defendant under an adverse and hostile claim, the application of the article has never been extended to cases in which the original receipt of the money by the defendant could not be deemed to be either in fact or by operation of law as a receipt on behalf, or for the use, of the plaintiff. The Article has, to my knowledge, been never applied to cases in which by reason of some subsequent events, the money, which was initially paid to the defendant for his own use, was to be regarded as in law money received by him for the plaintiff's use. In the present case, but for the subsequent intervention of Jai Dev Sharma and others, who claimed the property purchased by the plaintiff under an earlier sale, the receipt by the appellant of the money paid to him at the rateable distribution could not but be regarded as a receipt by him for his own use and benefit. The payment was made to him in partial discharge of his own decree and but for the declaration made by the Court in the suit of Jai Dev Sharma and others as to the property not being liable to sale in execution of the decrees of the appellant and the other decree-holders, the plaintiff could not have claimed any right to the aforesaid money and could not have been heard to say that the same had been received by the appellant for his use.

[9] It is noteworthy that in cases arising

under the Code of 1882, in which it was held that quite independently of the remedy given to him by S. 315 of the aforesaid Code an auction purchaser dispossessed of the property purchased by him at an execution sale on the ground of the judgment-debtor having no saleable interest therein could maintain a suit for the recovery of the purchase money, such a suit was held to be governed by Art. 120, Limitation Act. Reference may in this connection be made to the decision of a Division Bench of the Calcutta High Court in 50 Cal. 115⁵ and a judgment of a Division Bench of the Madras High Court in 16 Mad. 361.⁶ The same view of the law was taken by the Allahabad High Court in 35 ALL. 419.⁷

[10] In 10 Cal. 860⁸ their Lordships of the Committee held that the operation of Art. 62 was to be confined strictly to cases where at the time of the payment being made to the defendant such payment could be regarded as having been received for the plaintiff's use and that the Article could not be applied to suits to enforce equitable claims on the part of the plaintiffs to follow the money in the defendants' hands. The judgment of their Lordships reported in 58 I. A. 1⁹ seems to be another case in point. More recently a Full Bench of the Madras High Court in I. L. R. (1946) Mad. 311¹⁰ declined to apply Art 62 to a claim for following the money in the defendants' hands on equitable grounds.

[11] Reliance was placed by the learned counsel for the appellant on the judgment of a single Judge of the Madras High Court in A. I. R. 1935 Mad. 354¹¹ in which Art. 62 was applied to a suit brought by an auction purchaser against the decree-holder for the return of the sale price on the sale being set aside on the ground of some irregularity. With all respect to the learned Judge who decided the case, I must confess my inability to agree with the view taken by him, even on the facts of that case. The learned Judge appears wrongly to have assumed that Art 62, irrespective of its language, necessarily applies to all actions which may be regarded as analogous to actions known to the English law as those for money had and received.

[12] For the reasons given above, I am of the opinion that there is no force in this appeal and would dismiss the same with costs.

Teja Singh J.—I agree.

D.S.

Appeal dismissed.

[C. N. 2.]

A. I. R. (35) 1948 East Punjab 5

ACHHRU RAM J.

Indar Ram — Defendant — Appellant
v. Iqbal Mohd. and others — Plaintiffs —
Respondents.

Second Appeal No. 2207 of 1945, Decided on 2-12-1947, from decree of Dist. Judge, Hoshiarpur and Kangra, D/-31-7-1945.

Punjab Limitation (Custom) Act (1 of 1920), S. 8—Declaratory decree in favour of minor son of vendor in suit by him for declaration that alienation did not affect his reversionary interest — Major sons having no subsisting right at the time by reason of limitation — Death of vendor — Suit for possession by minor as well as major sons basing claim on declaratory decree held maintainable.

A, the father of I, F & M sold in 1926 land in dispute. Out of the three sons of A, I was minor at the time of the sale. In 1928 I brought a suit for declaration to the effect that the aforesaid sale should not affect his reversionary right after the death of his father. At the time of the suit F & M had no subsisting right to bring a declaratory suit in respect of the sale by reason of the operation of the statutes of Limitation. I's suit was decreed. A, the vendor died on 15-11-1944 and his three sons I, F & M brought a suit for possession of the land sold by A basing their claim on the declaratory decree obtained by I, declaring sale to be invalid except for the life-time of A. Claim of F & M was contested on the ground that they could not take advantage of the declaratory decree inasmuch as their own suit for a declaration that the sale should not affect their reversionary rights after the vendor's death had become barred by limitation at the time I brought his suit.

Held that in view of S. 8, F & M were entitled to the benefit of the declaratory decree obtained by I. They were entitled to impeach the alienation as the land was ancestral *qua* them and the alienation had not been made for legal necessity. The mere circumstance that they did not bring a suit to challenge the alienation within the prescribed period of six years could not be understood to indicate that they ceased to be entitled to impeach the alienation on the expiration of the said period. Except in cases covered by S. 28 of the Limitation Act the effect of failure of a person to bring a suit for the enforcement of his right within the period of limitation allowed by the law did not involve a loss or extinguishment of the right itself but merely involved loss of the remedy given to him by the law for the enforcement of that right. A declaratory decree in respect of the sale having actually been passed in a suit brought by one of the three sons of the vendor the suit for possession by the other persons found entitled to succeed at the time of the succession opening out was clearly governed by clause (b) of Article 2 of the Schedule to Act 1 of 1920 and having been brought within three years of the date of the death of the vendor the plaintiffs were clearly entitled to the decree claimed by them: 22 A. I. R. 1935 Lah. 391, *Explained and commented*; 2 A. I. R. 1915 P. C. 124; 3 A. I. R. 1916 P. C. 117 and 32 A. I. R. 1945 Lah. 76 (FB), *Rel. on.*

[Paras 5 & 6]

Cases referred.—

1. ('36) 17 Lah. 20 : 22 A. I. R. 1935 Lah. 391 : 161 I. C. 369, *Inder Singh v. Mian Singh.*
2. ('15) 38 Mad. 406 : 2 A. I. R. 1915 P. C. 124 : 42 I. A. 125 : 29 I. C. 298 (P C), *Venkatanarayana Pillai v. Subbammal.*

3. ('16) 39 Mad. 634 : 3 A. I. R. 1916 P. C. 117 : 43 I. A. 207 : 37 I. C. 161 (P. C.), *Janaki Ammal v. Narayanasami Aiyar.*

4. ('45) 32 A. I. R. 1945 Lah. 76 (F. B.), *Rahman v. Surajmal.*

S. S. S. Jhanda Singh—for Appellant.

Lala Jagan Nath Malhotra for S. L. Puri—for Respondents.

Judgment.—This second appeal has arisen under the following circumstances. Amanat Khan, the father of Iqbal Mohammad, Farmaish Khan and Ali Mohammad plaintiffs-respondents, sold, in the year 1926, 29 *kanals* and 5 *marlas* of land in dispute to Indar Ram defendant-appellant. Out of the three sons of the vendor, Iqbal Mohammad was a minor at the time of the sale. The aforesaid Iqbal Mohd, in 1938, brought a suit for a declaration to the effect that the aforesaid sale should not affect his reversionary rights after the death of his father. At the time the suit was brought Farmaish Khan and Ali Mohammad had no subsisting right to bring a declaratory suit in respect of the sale by reason of the operation of the statutes of limitation. Iqbal Mohammad's suit was decreed. Amanat Khan vendor died on 15th November 1944. On 28th November 1944, his three sons brought a suit for possession of the land sold by him to Indar Ram basing their claim to possession on the declaratory decree obtained by Iqbal Mohammad declaring the sale to be invalid except for the lifetime of the vendor. The defendant admitted the claim of Iqbal Mohammad to a decree for possession of his one-third share in the suit land. He, however, contested the claim of the other two plaintiffs on the ground that they could not take advantage of the declaratory decree inasmuch as their own suit for a declaration that the sale should not affect their reversionary rights after the vendor's death had become barred by limitation at the time Iqbal Mohammad brought his suit. The learned trial Judge overruled this contention of the defendant and held that in view of the provisions contained in S. 8, Punjab Act (1 of 1920), Farmaish Khan and Ali Mohammad plaintiffs were entitled to the benefit of the decree in spite of the fact that at the time the suit culminating in that decree was brought they had no subsisting right to bring a suit for a declaration in respect of the sale by reason of efflux of time. On this view of the case he granted the plaintiffs a decree for possession of the whole of the land in suit subject to payment of a sum of Rs. 1226-13-0 which in the declaratory decree passed in the suit brought by Iqbal Mohammad had been held to be a valid charge on the land. The defendant appealed to the learned District Judge but without success. He has come up in second appeal to this Court.

[2] After hearing the learned counsel for the appellant, I am of the opinion that this appeal is wholly devoid of force. Section 8, Punjab Act (1 of 1920) provides that when any person obtains a decree declaring that an alienation of ancestral immovable property is not binding on him according to custom the decree enures for the benefit of all persons entitled to impeach the alienation. There can be no doubt as to Ali Mohamad and Farmaish Khan plaintiffs being entitled to impeach the alienation in question if the land was ancestral *qua* them and the alienation had not been made for legal necessity. That the land was ancestral *qua* them and that the sale was not for legal necessity except to the extent of Rs. 1226-13-0 is not disputed. Under the circumstances, their case clearly falls within the purview of S. 8. The mere circumstance that they did not bring a suit to challenge the alienation within the prescribed period of six years cannot be understood to indicate that they ceased to be entitled to impeach the alienation on the expiration of the said period. Except in cases covered by S. 28, Limitation Act, the effect of failure of a person to bring a suit for the enforcement of his right within the period of limitation allowed by the law does not involve a loss or extinguishment of the right itself but merely involves the loss of the remedy given to him by the law for the enforcement of that right.

[3] Mr. Jhanda Singh, the learned counsel for the appellant, strenuously relied on the following observations in the judgment of a Division Bench of the Lahore High Court in 17 Lah. 20¹:

"From the words 'entitled to impeach the alienation' used in S. 8, it appears that the Legislature intended to include those persons only who possessed *in presenti* any right to challenge the alienation and to exclude those who either possessed no such title or having possessed it had lost it by their own act or by the operation of law. A right once lost cannot be regained and any decree obtained by those whose right subsists cannot entitle those who have lost their right to obtain possession on the basis of that decree. By no stretch of language, therefore, can the word 'entitled' be taken to include those whose title is not alive. In its ordinary grammatical sense also the word 'entitled' is not equivalent to 'were entitled' or 'had been entitled' or 'may have been entitled' and it will be straining the language too far if the signification of this word is so extended as to cover that title also which no longer exists and has been extinguished before the decree is obtained."

The facts giving rise to the case in disposing of which the above observations were made were briefly these. The dispute related to the property of one Khewan Singh who had adopted one Ganda Singh as his son. Ganda Singh was succeeded by his son Bur Singh who died without issue leaving a widow Mt. Banti by name. Ganda Singh had a brother Hakim Singh whose sons took possession of the property inherited by

Ganda Singh from Khewan Singh on the death of Bur Singh. Some time after this, Mt. Banti re-married. On her remarriage, the descendants of Khewan Singh's brothers sued for possession of the property left by Bur Singh on the ground that the line of the adopted son of Khewan Singh having become extinct the property inherited by the former from the latter which was ancestral in the latter's hands *qua* the plaintiffs reverted to the plaintiffs as his reversioners. A part of the land in suit was found by the trial Judge to be non-ancestral *qua* the plaintiffs in Ganda Singh's hands. He, however, felt himself bound by a contrary decision with regard to that land in a previous suit brought by some of the plaintiffs to avoid an exchange of that land effected by Bur Singh during his lifetime. In that suit the land had been held to be ancestral *qua* the then plaintiffs and the exchange was accordingly declared to be invalid and inoperative against their interests. At the time the suit to avoid the exchange was brought more than six years had expired since the date of the exchange and the plaintiffs who brought the suit had claimed exemption from the law of limitation on the ground of their minority at the time of the accrual of the cause of action. The other plaintiffs, in the suit brought after the remarriage of Mt. Banti, had not joined in the suit brought to avoid the exchange for the obvious reason that they had allowed their limitation for such a suit to expire and were not in a position to claim exemption from the law of limitation on any ground. The question which the Bench was called upon to decide was whether the decision in the previous suit with regard to the character of the land, which formed the subject matter of the exchange, could operate as *res judicata* in the subsequent suit for possession. The Bench was of the opinion that the rule of *res judicata* did not and could not operate in favour of the persons who were not parties to the previous suit and that the aforesaid suit could not be regarded as a representative suit within the meaning of Explan. 6 to S. 11. The question of the interpretation to be placed on S. 8 of Punjab Act (1 of 1920) did not directly arise and therefore the observations made by them with regard to the meaning and the implications of the aforesaid section cannot but be regarded as in the nature of *obiter dicta*.

[4] With the utmost respect for the learned Judges who constituted the Bench I find myself unable to agree with the view expressed by them with regard to the implications of and the interpretation to be placed on S. 8, Punjab Act (1 of 1920). In making the observations quoted above and in taking the view to which they gave expression in those observations the learned Judges have obviously overlooked the distinction between

the loss and extinguishment of the right itself in consequence of failure to bring an action for its enforcement within the time allowed by law and the mere loss of remedy, as distinguished from the right itself in respect of which that remedy was given by the law as a result of such failure. The learned Judges seem further to have lost sight of the rule of law deducible from the pronouncements of their Lordships of the Privy Council relating to the position of reversioners and reversionary interests. It is a settled law that till succession opens out the reversionary right is a mere possibility or *spes successionis*. This possibility is common to all the reversioners, for it cannot be predicated who would be the nearest reversioner at the time of the succession opening out. Although the law permits the institution of suits in the lifetime of a life tenant for a declaration that an alienation made by such life tenant is not valid, the suit which must ordinarily be brought by the nearest reversioner is not for his personal benefit. The object of such suit is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Whatever form the decree passed in such a suit may be given, in effect and in substance it is a decree declaring that the alienation is not binding against the inheritance: *vide* 38 Mad 403.² See also 39 Mad 634.³ Under these circumstances there can be no justification at all for assuming as the learned Judges of the Lahore High Court appear to have done that a decree obtained in respect of an alienation by a life tenant can be regarded as a decree in favour of or benefiting only some of the reversioners and not the entire reversionary body.

[5] It is to be observed that ordinarily a reversioner although he has the right to do so, is not bound to sue to avoid the alienation by a life-holder before the succession opening out and the person entitled to succeed at the time the succession opens out can straightway bring a suit for possession of the property alleged to have been wrongfully alienated by the life holder, and normally has a period of 12 years either under Art. 141 or Art. 144, according as the alienor was a female or a male within which to sue for possession of such property. Punjab Act, I of 1900 for the first time imposed limitation on the rights of the reversioners by enacting that a suit for possession of ancestral property alleged to have been wrongfully alienated must be brought within 12 years of the date of the alienation except where a declaratory decree declaring the alienation to be invalid except for the life-time of the alienor had already been obtained. Punjab Act 1 of 1920 reduced this period to six years. Once a declaratory decree in respect of the alienation has been obtained this artificial limitation on the normal

right of the person, who at the time of the succession opening out is found to have the right to succeed, to sue for dispossession of the party holding under a wrongful alienation, ceases to be operative, it being wholly immaterial whether he himself obtained the declaratory decree or it was some other reversioner who did so. Section 8 of the Punjab Act I of 1920 merely extends a statutory recognition to this principle which must be deemed to be otherwise implicit in the view that has been taken by the Privy Council as to the position of reversioners and reversionary interest.

[6] More recently the question came up for consideration before a Full Bench of the High Court, Lahore, of which my Lord the Chief Justice of that Court was also a member and of which the judgment was written by Mahajan J. The question that directly arose in that case was whether a son born to the alienor long after the alienation, who himself at the time of his birth had no subsisting right to sue for a declaration in respect of the alienation made by his father, could claim the benefit of a declaratory decree obtained by a remoter reversioner. The question was answered by the Full Bench in the affirmative. The following observations in A.I.R. 1945 Lah. 76⁴ at p. 79 are quite apposite to the present case :

"Another aspect of the same question is that the right to impeach an alienation is not lost or made extinct by the expiry of the period of limitation. It is only the remedy that is lost in such a case. Section 28, Limitation Act, has no application whatsoever to declaratory suits of this nature. That section only governs suits for possession. That being so, the right of a reversioner, if he possesses it, and it was not denied that an after-born son does possess that right, provided at the time of alienation some reversioner is in existence, cannot become extinct. All that is lost, if he is not born within the period of limitation, is his remedy to enforce that right by suit. In a case where the declaratory decree has already been obtained by some representative of the reversionary body the loss of this remedy does not affect the after-born son. The remedy that was available to him was the same that was available to the presumptive reversioner and relief having already been obtained concerning that single cause of action that was common to the after-born son and the presumptive reversioner no further relief regarding that matter could be given a second time. The right, therefore being there and having not been lost by the expiry of limitation, on the other hand, the relief having already been obtained and the relief being of the same nature and kind which the after born son if his suit was within limitation, could have obtained, he is certainly one of the persons who is entitled to the benefit of that relief."

These observations, with which I find myself in respectful agreement, are clearly applicable to this case and Farmaish Khan and Ali Mohammad plaintiffs cannot be said to have ceased to be entitled to impeach the alienation merely because they did not sue to avoid the sale within the time allowed by law. A declaratory decree

in respect of the sale having actually been passed in a suit brought by one of the three sons of the vendor the suit for possession by the other persons found entitled to succeed at the time of the succession opening out is clearly governed by cl. (b) of Art. 2 of the Schedule to Act 1 of 1920 and having been brought within three years of the date of the death of the vendor the plaintiffs are clearly entitled to the decree claimed by them. For the reasons given above, the appeal fails and is dismissed with costs.

R.G.D.

Appeal dismissed.

[C. N. 3.]

A. I. R. (35) 1948 East Punjab 8

TEJA SINGH J.

Sant Ram—Plaintiff—Appellant v. Atma Singh—Defendant—Respondent.

Second Appeal No. 1410 of 1946, Decided on 11-11-1947, from decree of Senior Sub-Judge, Jullundur, D/- 6-5-1946.

Civil P. C. (1908), S. 47—Suit for money against father — Death of father during pendency — Son brought on record as legal representative and decree passed to be recoverable out of father's estate—Attachment and sale in execution—Objection that property belonged to son not brought in execution—Separate suit is barred.

A suit was brought against R by D for a specific sum of money. R died during the pendency of the suit and thereupon R's son S was brought on the record as his legal representative. A decree was passed in D's favour against S but recoverable out of R's estate. The decree-holder assigned the decree in favour of A who sued out execution and attached the property and ultimately purchased it himself. S did not object in execution that the property belonged to him in his personal capacity :

Held, that the proper remedy for S was to object under S. 47 and hence a separate suit was barred : 26 A. I. R. 1939 Pat. 354, *Not approved* ; 8 A. I. R. 1921 Lah. 173 ; 26 A. I. R. 1939 Lah. 51 and 26 A. I. R. 1939 Lah. 178, *Approved* ; 34 A. I. R. 1947 Bom. 307, *Disting.* [Paras 4 and 7]

Annotation. — ('44-Com.) Civil P. C., S. 47, Notes 4 and 7.

Cases referred :—

1. ('39) 26 A. I. R. 1939 Pat. 354 : 179 I. C. 538, Lachmi Lal v. Firm Shrinivas Ram Kumar.
2. ('21) 8 A. I. R. 1921 Lah. 173 : 63 I. C. 853, Bhagat Ram v. Nizam Din.
3. ('39) 26 A. I. R. 1939 Lah. 51 : 182 I. C. 697, Lloyds Bank Ltd., Lahore v. Mt. Rehmat Bibi.
4. ('39) 26 A. I. R. 1939 Lah. 178 : 1 I. L. R. (1939) Lah. 493 : 186 I. C. 168, Lloyds Bank Ltd., Lahore v. Mt. Rehmat Bibi.
5. ('47) 34 A. I. R. 1947 Bom. 307, Dareppa Alagonda v. Mallappa Shivalingappa.

Balraj Tuli for Hira Lal — for Appellant.

Chaudhry Roop Chand — for Respondent.

Judgment.—This second appeal arises out of a suit for redemption based on a mortgage of 21-2-1936 made by Sant Ram son of Rala in favour of Atma Singh. Sant Ram, who was the plaintiff in the case, contended that though the mortgage was for Rs. 90 he was entitled to re-

deem the house on payment of Rs. 10 only, because the defendant had removed the *malba* of the house which was worth Rs. 80. Atma Singh defendant admitted the factum of the mortgage but denied the plaintiff's right to redeem. The position taken up by him was that the house had been sold at a court-auction in execution of a money decree against Rala, to whom it originally belonged and since the sale had been knocked down in his (Atma Singh's) favour the equity of redemption no longer remained vested in Sant Ram. He also raised a technical objection that Sant Ram being a party to the suit in which the decree in question was passed his proper remedy was to object under S. 47, Civil P. C., and that the suit for redemption was barred. The facts relating to the decree, in execution of which the house was attached and sold are not denied and they are as follows :

[2] One Dharma sued Rala father of Sant Ram for a specific sum of money. Rala died during the pendency of the suit on which Sant Ram was brought on the record as his legal representative. A decree was passed in Dharma's favour against Sant Ram but recoverable out of Rala's estate on 27-1-1938. Later on, Dharma assigned the decree in favour of Atma Singh who sued out execution and attached the house, which is the subject-matter of the dispute in the present case, as Rala's property. In the auction sale that ensued Atma Singh himself bought the house on 7-7-1941.

[3] The trial Sub-Judge overruled the technical objection raised by Atma Singh defendant and granted Sant Ram a decree for redemption of the house on payment of Rs. 90. The Senior Subordinate Judge on appeal affirmed the finding of the lower Court that the charge on the mortgaged property amounted to Rs. 90, but he dismissed the suit holding that it was barred by virtue of S. 47, Civil P. C.

[4] It is argued on behalf of the appellant that in spite of the fact that he was impleaded as a defendant in the suit brought against his father by Dharma he was not bound to raise an objection in the execution proceedings against the attachment and liability to the sale of the house, because his father had no right, title or interest in the house. In support of his contention the learned counsel referred me to a Division Bench decision of the Patna High Court reported in A. I. R. 1939 PAT. 354¹. It was held in that case that where a person who has two capacities, one as representative of the judgment-debtor and another as his personal capacity comes forward and objects in his personal capacity that the property is his own personal property there is no reason why he should be limited to the objection under S. 47. A different view

was, however, taken by a Division Bench of the Lahore High Court in A. I. R. 1921 LAH. 173.² There a money decree was passed against one Imam Din and a house that was alleged to belong to him was attached in execution proceedings. The heirs of Imam Din who had been brought on record as his legal representatives objected to the sale on the ground that the property in question belonged to them and Imam Din had no right, title or interest in it. Their objection was disallowed and on this they brought a suit for a declaration that the house belonged to them and it had been wrongly sold in execution of the decree. It was held that the suit was not competent. After referring to a number of cases this is what the learned Judges said:

"In those cases it was clearly laid down that where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, the questions which they raise as to property which they say does not belong to the assets of the judgment-debtor in their hands and as such is not capable of being taken in execution are questions which are governed by S. 47 and therefore a separate suit does not lie. It matters little whether the proceedings in execution had come to an end and the property had been sold. To hold that S. 47 should apply only to a case where the execution proceedings are pending would be reading something into the section which is not there and stultifying its provisions."

It is correct that in the present case Sant Ram's father died before the decree and Sant Ram was impleaded as a defendant during the pendency of the suit, but this should not make any difference so far as the application of S. 47 is concerned. On the other hand, I am inclined to think that it attracts the provisions of the section with greater force, because it was against Sant Ram that the decree was passed though the amount was held recoverable out of his father's assets, and as such he was a party to the suit in the real sense of the word.

[5] This question came up for discussion before the High Court of Lahore, in two later cases. The first is A. I. R. 1939 Lah. 51³ decided by Dalip Singh J. The case related to the execution of a mortgage decree and the question was whether an objection by a legal representative of the mortgagor, who had been made a party to the proceedings in that capacity, that the property against which the decree had been passed belonged to the legal representative, and not the mortgagor, and was therefore not liable to sale in execution of the decree, came within the purview of S. 47. The learned Judge while answering the question in the affirmative made the following observations:

"It is true that the decree has directed the sale property in mortgage decree but this decree is final only between the parties to suit and the legal representative who wishes to raise an objection to the sale in her own right does not appear to me to be bound by

the decree in the same way as a party is. The question, therefore, is purely one of procedure. It is conceded on all hands that in the case of a money decree when the legal representative raises an objection to the sale of property based on her own right such objection can be dealt with and is properly dealt with only under S. 47 and a separate suit is barred. I am unable to see why the same procedure should not be followed in the case of a mortgage decree."

Then the learned Judge went on to say that by applying S. 47 to a case of the kind no inconvenience resulted and no real difficulty arose, but we are not concerned with all that in the present case.

[6] The next case is A. I. R. 1939 Lah. 178⁴ decided by a Bench consisting of Addison and Abdul Rashid JJ. As regards the application of S. 47 to an objection by the legal representative of a mortgagor in execution of a mortgage decree the learned Judges took a view different from that of Dalip Singh J. in the case mentioned above. But so far as a money decree is concerned, their opinion was the same as his. The following passage appearing in their judgment may be quoted with advantage:

"It appears to us that there is a clear distinction between a money decree and a mortgage decree, even in cases where the legal representative of the judgment-debtor raises an objection which was not open to the judgment-debtor but which is based on an independent title of the legal representative. In the case of money decree it is for the executing Court to determine how the decretal amount is to be recovered from the judgment-debtor and which property, if any, has to be sold in execution of the decree."

[7] The appellant's counsel also drew my attention to A. I. R. 1947 Bom. 307.⁵ That was also a case relating to a mortgage decree and as was held in A. I. R. 1939 Lah. 178,⁴ the principles governing the execution of such a decree do not apply to that of a money decree. No doubt the Patna case is in favour of the appellant, but with all deference I prefer to follow the view taken by the Lahore High Court.

[8] The result is that the appeal must fail and is dismissed. In view of the difficult nature of the question involved it is directed that the parties shall bear their own costs throughout.

D.S.

Appeal dismissed.

[C. N. 4.]

A. I. R. (35) 1948 East Punjab 9

TEJA SINGH J.

Purshotam Lal—Defendant—Appellant v. Piyare Lal, Plaintiff and another, Defendant—Respondents.

S. A. No. 12 of 1947, Decided on 20-11-1947, from order of District Judge, Ludhiana, D/- 15-10-1946.

Court-fees Act (1870), S. 7 (v) (b) and Explanation—Scope—Clause (b) is not confined to case of entire estate—Suit for possession of land separately assessed to revenue—Cl. (b) of 7 (v) applies—Term "land" covers all kinds of land regardless of use

to which it is put—Single field separately assessed with revenue is estate within explanation.

The term "land" is not defined anywhere in the Court-fees Act. It should, therefore, be interpreted in the ordinary sense, and should cover all kinds of land, regardless of the use to which it is put or may be likely to be put. The term "estate" is used in S. 7 in a particular sense which is made clear by the Explanation, appended to cl. (v) of S. 7. Even when a single field is separately assessed with revenue it can be regarded as an estate within the meaning of the Explanation and there being no other field comprised in that estate, it would constitute "entire estate." Sub-cl. (b) is not confined to the case of an entire estate. The last words of the sub-clause deal with lands forming part of an estate and when the part is recorded as assessed to revenue, sub-cl. (b) applies. [Para 3]

Hence a suit for possession of land separately assessed to land revenue is governed by sub-cl. (b) of S. 7 (v). [Para 3]

Annotation.—('44-Com.) Court-fees Act, S. 7 (v) Nos. 14, 18, 19.

Asa Ram Aggarwal—for Appellant.

Nathu Lal Wedhera—for Respondents.

Judgment.—As regards the preliminary objection, Mr Nathu Lal now concedes that by virtue of the addition of R. 23 (a) to O. 41, the appeal is competent.

[2] What has now to be determined is whether the court-fee paid by the plaintiff on the plaint was proper. This being a suit for possession court-fee was payable under S. 7, cl. (v), Court-fees Act. Mr. Asa Ram Aggarwal contends that sub-cl. (d) of cl. (v) applies. The lower appellate Court, on the other hand, has taken the view that the case comes under sub-cl. (b). These sub-clauses read as follows :

"(v) In suits for the possession of land, houses and gardens—according to the value of the subject-matter ; and such value shall be deemed to be—where the subject-matter is land, and

(b) Where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid;

and such revenue is settled, but not permanently, ten times the revenue so payable :

(d) Where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above mentioned—the market value of the land":

[3] The trial Subordinate Judge was of the opinion that the word "land" mentioned in the section means agricultural land and when the land is not used for agricultural purposes, or when it was so used at one time but has later on changed its character and is meant to be used as building site etc., court-fee should be paid on the market value and not in accordance with the land revenue, even though the land is assessed to revenue. This view does not appear to me to be correct. The term "land" is not defined anywhere in the Court-fees Act. It should, therefore, be interpreted in the ordinary

sense, and should cover all kinds of land, regardless of the use to which it is put or may be likely to be put. It may also be mentioned that any other interpretation would land us in a difficult position, because if it is assessed to land revenue and the other conditions of cls. (a), (b) or (c) are satisfied, there will be no other clause applicable to it under which court-fee could be charged on the market value. According to the wording of cl. (d) court-fee is payable on the market value where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed. So if the land forms a definite share of an estate paying land revenue to Government, or even though it does not form a definite share it is separately assessed to revenue, cl. (d) would have no application and there will be no authority for insisting that court-fee should be paid on the market value. I must here observe that Mr. Aggarwal frankly accepted this interpretation. What he however urged was that sub-cl. (b) of cl. (v) of S. 7 could have no application because the suit land did not form an entire estate, nor did it form a definite share of an estate. He argued that according to the rules and the practice of the Revenue authorities only *khata*s are separately assessed to revenue and if a field out of a *khata*, forms the subject-matter of a suit and that field does not constitute a definite share of the *khata*, court-fee cannot be paid on the land revenue. Mr. Aggarwal may or may not be right so far as the practice of the Revenue authorities is concerned, but his contention in so far as it relates to this case does not carry conviction with me, because the term "estate" is used in S. 7 in a particular sense which is made clear by the explanation, appended to cl. (v) of S. 7. These are the words of the explanation :

"The word 'estate' as used in this paragraph means any land subject to the payment of revenue, for which the proprietor or farmer or *raiyat* shall have executed a separate engagement to Government or which, in the absence of such engagement, shall have been separately assessed with revenue".

In the present case we do not know of any engagement between the Government and the owner of the suit land, but it is clear from Ex. P. 2 that it is separately assessed to land revenue. Mr. Aggarwal then urged that even if the suit land can be regarded as an estate, it was not an entire estate and since sub-cl. (b) definitely mentions the words "entire estate", the case is not governed thereby. I have already made clear that even when a single field is separately assessed with revenue it can be regarded as an estate within the meaning of the explanation and there being no other field comprised in that estate, it would constitute "entire

estate". Apart from this it may be pointed out that sub-cl. (b) is not confined to the case of an entire estate. The last words of the sub-clause deal with lands forming part of an estate and when the part is recorded as assessed to revenue, sub-cl. (b) applies. This being the view of the lower appellate Court, the appeal fails and is dismissed with costs. The record of the case shall be returned to the Court of the trial Subordinate Judge forthwith. The parties' counsel have been directed to cause their respective clients to appear before that Court on 15.12.1947.

S.C.

Appeal dismissed.

[C. N. 5.]

A. I. R. (35) 1948 East Punjab 11**TEJA SINGH AND ACHRU RAM JJ.***Hari Chand — Appellant v. Lachhman Das and others — Respondents.*

Letters Patent Appeal No. 158 of 1946, Decided on 18-12-1947, from judgment of Khosla J. in F. A. O. No. 158 of 1945, D/- 12-6-1946.

(a) Arbitration Act (1940), S. 14 (2) — Notice of filing of award is imperative — Such notice can be oral — It can be implied from nature of order — Order recording presence of parties at time of filing award — Notice cannot be implied — Limitation under Art. 158, Limitation Act, does not run from such an order — Limitation Act (1908), Art. 158.

Under S. 14 (2), Arbitration Act, after award has been filed in Court, the Court shall give notice to the parties of the filing of the award. This is a statutory provision and it cannot be dispensed with. Notice, however, need not be in writing. It can be oral. It can be implied from the order of the Court. But where the order merely records the presence of the parties when the award was filed by the arbitrators but does not say that any notice of the filing of the award was given to them, no notice can be implied from this order. Nor can the notice be implied from the mere mention of the fact that the award has been filed, specially when the orders passed by the Court on subsequent date make it clear that it was only on that subsequent date that the Court thought of giving notice of the filing of the award: 29 A. I. R. 1942 Lah 190, *Ref.* [Para 2]

Under Art. 158, Limitation Act, as it now stands amended by Act X of 1940, objections to the award have to be put in within thirty days from the date when the award is filed in Court and notice of the filing has been given to the parties, which in the above case, is not the date when the order mentioning the filing of the award and the presence of the parties was recorded. [Para 2]

Annotation :— ('46-Man) Arbitration Act, S. 14, N. 2, Pt. 1; ('42-Com) Limitation Act, Art. 158 N. 4.

(b) Arbitration Act (1940), S. 9 (b) — Arbitrator appointed by party cannot arrogate to himself functions of sole arbitrator on failure of other side to nominate its arbitrator within time.

After the other side to the dispute had refused to appoint its arbitrator within fifteen days of the service of the notice upon them, it is open to the party to the dispute to appoint its own arbitrators as sole arbitrators in the reference. Unless there is a formal appoint-

ment in the words of cl. (b) to S. 9 the arbitrator appointed by one party cannot arrogate to himself the functions of a sole arbitrator on the failure of the other party to nominate its own arbitrators within time and has no jurisdiction to proceed with the reference. The fact that notice is given by the arbitrator to the other side that he is going to act as sole arbitrator in the case cannot be regarded as substantial compliance with the provisions of cl. (b) of S. 9, when there is no mention in the notice of the fact that the arbitrator has been appointed sole arbitrator but merely that he intended to act as sole arbitrator. [Paras 3 & 4]

Annotation :— ('46-Com) Arbitration Act, S. 9 N. 3.

Case referred :—

1. ('42) 29 A. I. R. 1942 Lah. 190 : 201 I.C. 462, *Imam Din v. Allah Rakha.*

Som Datia Bahri and K. C. Nayar—for Appellant.

Asa Ram Aggarwal — for Respondents.

Teja Singh J.— These are two connected Letters Patent Appeals from the judgments of a learned single Judge of the Lahore High Court. The facts of the litigation giving rise to the appeals are given in detail in the judgments under appeal and need not be recapitulated here. Briefly it may be mentioned that contracts for the purchase of sugar were entered into between the firm Hari Chand-Sat Pal on one side and the other two firms, namely, Lachhman Das-Mul Raj and Lachhman Das-Shadi Ram on the other. The said two firms paid certain amounts to the first firm as earnest money and it was agreed between them that the sugar to which the contracts related would be supplied to them in the months of June, July, August and September 1939 on receipt of instructions from them by the 21st of the month in question. Term No. 3 of the Bought Note was to the effect that if no instructions were received by the appointed dates, Hari Chand and Sat Pal would be free to forfeit the earnest money and to cancel the contracts. There was also a provision in the contracts that in case of any difference or disputes between the parties the matter would be referred to the arbitration of two persons, one to be appointed by each of the contracting parties. It was alleged on behalf of the firm Hari Chand-Sat Pal that no instructions for the despatch of the sugar were received by them by the appointed dates and accordingly they sold the sugar to which the contracts related on various dates in August and September and since the transactions resulted into loss to them they were entitled to recover the amount of loss from the other two firms. On 30th July 1942 they sent notices to the firms of Lachhman Das-Mul Raj and Lachhman Das-Shadi Ram informing them that they had appointed separate arbitrators to decide the questions in dispute between them and calling upon them to appoint their arbitrators within the time allowed by law. These notices having been refused fresh notices were

issued and when the other firms did not appoint any arbitrator, the arbitrators appointed by Hari Chand-Sat Pal proceeded to dispose of the matters referred to them as sole arbitrators and gave their awards. The proceedings in the cases started on the applications of the arbitrators praying that the awards be filed and decrees be passed in terms thereof. The firms of Lachhman Das-Mul Raj and Lachhman Das-Shadi Ram had been dissolved in the meanwhile and consequently their partners, viz., Lachhman Das and Mul Raj in one case and Lachhman Das and Shadi Ram in the other along with Hari Chand, who was said to be the sole proprietor of the firm Hari Chand-Sat Pal, were impleaded as defendants. When notices of the applications were issued to the defendants, Hari Chand supported the applications while the other defendants opposed them on various grounds. The trial Sub-Judge spurned all the objections to the applications and the awards and made the awards the rules of the Court in both the cases. Lachhman Das alone preferred appeals from the orders of the trial Court. The learned single Judge accepted the appeals and set aside the orders of the Court below, leaving the parties to bear their own costs throughout.

[2] My opinion is that the appeals must be dismissed on the short ground that the appointments of the arbitrators were not valid but before I set out the grounds in support of this view, I must dispose of the contention of the appellants' counsel that the objections raised by the contesting defendants to the awards were barred by time and accordingly they should not have been taken into consideration. Under Art. 158, Limitation Act, as it now stands amended by Act, 10 of 1940, objections to the award have to be put in within 30 days from the date when the award is filed in Court and notice of the filing has been given to the parties. The records of the cases go to show that the arbitrators produced their awards in Court on 29-11-1943. The orders of the Court of that date read as follows: "The arbitrator's counsel has put in the award. (The case?) To come up on 26-1-1944 for reply." The word used is "Jawab" and probably what the Court meant was "written statement". On the 26th Lachhman Das filed written statements raising a preliminary objection to the jurisdiction of the Court. He pleaded that the entire cause of action had accrued at Moga in the district of Ferozepore and accordingly the Courts in Jullundur had no jurisdiction to hear the suits. A note was appended to the written statements that the objections would be put in after the question of jurisdiction had been decided. On 29-5-1944 the Court decided that it had jurisdiction to hear the cases and called upon the defen-

dants to put in detailed written statements on 26-6-1944. The same day it recorded another order in the following words in each case:

"The arbitrator has filed the award in Court. Notice of it has been given to the parties. They should put in objections regarding the award and reference on 26-7-1944."

In accordance with this order Lachhman Das filed detailed objections to the awards and references on 26-7-1944, but he also put in certain objections on 26th June wherein he denied that the arbitrators had been appointed in accordance with the provisions of law and pleaded *inter alia* that the arbitrators' awards were not legal, that the proceedings conducted by them were invalid and that they were guilty of misconduct. The point urged by the appellants' counsel before us was that since Lachhman Das had notice of the filing of the awards on 29-11-1943, all objections put in by him, including the preliminary written statements of 26-1-1944, even if they be regarded as objections to the award, were barred by time. The learned counsel conceded that according to the words of Art. 158, time for filing objections to an award would start not from the date on which the award is put in Court but from the date when notice of its filing is given to the parties concerned, but he urged that since in the present cases the respondents' counsel was present when the Court made a note that the awards had been filed, no formal notice was necessary. He further contended that the orders of the Court dated 29-11-1943 recorded in the presence of the respondents' counsel implied a notice of the filing of the award and accordingly objections to the award should have been put in within 30 days of those orders. The contention appears to me to be wholly devoid of force. It was under S. 14, Arbitration Act, that the arbitrators applied to the trial Court and sub-s. (2) of that section definitely lays down that after the award has been filed in Court, "the Court shall thereupon give notice to the parties of the filing of the award." This is a statutory provision, and it is futile to urge that any Court can dispense with it. The learned counsel drew our attention to certain observations made by Tek Chand J. in A.I.R. 1942 Lah. 190.¹ In that case, the arbitrator had given his award to the Reader of the Court, in the absence of the parties and on a day on which the presiding officer of the Court was on leave. On 28-6-1940 when the presiding officer came, he passed the order directing the parties to file objections to the award, if any, within the time prescribed by law. Objections were put in within ten days of this order. The learned Judge while holding that time under Art. 158 for filing objections commenced not from the date on which the arbitrator made over

his award to the Reader of the Court but from 28-6-1940 and after referring to a few cases remarked as follows :

"In order to put the matter beyond doubt Art. 158 was amended in 1919 and it was enacted that the date from which the period of ten days begins to run is 'when the award is filed in Court and notice of the filing has been given to the parties.' By this amendment the legislature made it clear that 'filing' the award is not equivalent to its 'submission' to the Court, and the *terminus a quo* is the date of service on the parties of the notice of the filing. The notice, of course, need not necessarily be in writing, formally delivered to the parties : it might be given orally if the parties are present in Court personally or by authorised agent at the time of the filing of the award."

(The amendment of Art. 158 whereby the period of limitation was increased from ten days to thirty days was made after this case). I do not agree with the learned counsel that this ruling can help him in any way. On the other hand, it goes against him to some extent, inasmuch as it lays down that the time for filing objection starts from the date of service on the parties of the notice of the filing of the award. As regards the proposition that notice need not be in writing and may be oral, I respectfully accept it as correct, but the question is whether any oral notice was given to the parties by the Court on 29-11-1943 or whether such a notice can be implied from the orders recorded by the Court on that day. I have no hesitation in holding that the answer to the question must be in the negative. The orders no doubt record the presence of the parties but they do not say that any notice of the filing of the award was given to them. Nor could the notice be implied from the mere mention of the fact that the award had been filed, because a reference to the orders of the Court dated 26-6-1944 makes it clear that it did not intend to give any notice. The words of the latter orders, which have been reproduced above, leave no doubt in my mind whatever that it was only on that day that the Court thought of giving the notice of the filing of the award to the parties, gave a verbal notice to them and explicitly mentioned this fact in its orders. And the reason for all this was that the Sub-Judge either because of inadvertence or because of ignorance did not fully realise the significance of the proceedings pending before him, which were under the Arbitration Act, and was probably all along thinking of the procedure laid down in Sch. 2, Civil P. C. It appears to me that not only the Sub-Judge but even the arbitrator's counsel, who made the applications on his behalf, also laboured under the same mistake and though S. 14, Arbitration Act, was cited in the headings of the applications, he appeared to think that the procedure for such applications, was the same as that under Sch. 2,

Civil P. C. Under S. 14, all that an arbitrator is to do is to cause his award or a signed copy of it, together with any depositions and documents which may have been taken and proved before him, to be filed in Court. It is true that this an arbitrator can do only by means of a formal application, but the law does not require that any notice of the application should be given to the parties. The notice laid down in sub-s. (2) of S. 14, has to be of the filing of the award. The case of an arbitration without the intervention of a Court under the old law was governed by para. 20, of Sch. 2, and when an application for filing an award was made to the Court, first notice was given to the parties to show why the award should not be filed and after the award had been filed, time was granted for putting in objections to the award. The procedure observed by the Sub-Judge in the present cases was similar to that laid down in proceedings under para. 20, Sch. 2, and it was for this reason why he first recorded a formal order stating that the award had been filed and then gave a notice of this fact to the parties and called upon them to put in objection. This may be unfortunate, but it shows without doubt that no notice of the filing of the award was contemplated by, or could be implied from, the order of 29th November 1943. It was on 26th June 1944 that notice was given and reckoning the time from that date, the objections of 26th June 1944 and even of 26th July 1944 were within time.

[3] As regards, the appointment of the arbitrator, it is conceded that each party was to nominate its own arbitrator and notices were given to the other two firms by the counsel of the firm Hari Chand-Sat Pal that they had appointed separate arbitrators to settle the disputes. It is also conceded that the other side were given fifteen days time to appoint their arbitrators but they failed in this. The procedure that is to be followed in cases of this kind is laid down in S. 9, Arbitration Act. The relevant part of it may be quoted with advantage:

"Where an arbitration agreement provides that a reference shall be to two arbitrators one to be appointed by each party, then, unless a different intention is expressed in the agreement. . . . (b) If one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent: Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown allow further time to the defaulting party

to appoint an arbitrator or pass such other order as it thinks fit".

It will be seen from clause (b) that after the other side had refused to appoint their arbitrator within fifteen days of the service of the notice upon them, it was open to the appellants' counsel to appoint their own arbitrators as sole arbitrators in the reference, but they did nothing of the kind. The appellants' learned counsel argued that there was no necessity of a formal appointment of the arbitrator previously appointed as sole arbitrator but I do not find it possible to agree with him. The words of clause (b) appear to me to be very clear and as I read them, my opinion is that unless there is a formal appointment in the words of the clause the arbitrator appointed by one party cannot arrogate to himself the functions of a sole arbitrator and has no jurisdiction to proceed with the reference. The words of the proviso to the section strengthen this conclusion. It lays down that after an arbitrator appointed by one of the parties has been appointed as the sole arbitrator under clause (b) a special right accrues to the other party to have that appointment cancelled by the Court and to apply for being granted further time for appointing his own arbitrator, and to hold that no formal appointment need be made, would be to deprive the other party of that right.

[4] Last of all it was argued by the appellants' counsel that the notice given by the arbitrators in each case to the other side that they are going to act as sole arbitrators in the respective cases should be regarded as substantial compliance with the provision of clause (b) of S. 9, but there is no substance in this argument either, because there was no mention in the notices of the fact that the arbitrators had been appointed sole arbitrators. All that was mentioned in them was that they intended to act as sole arbitrators, but this they could not do unless they had been duly appointed. The result is that the appeals fail and are dismissed with costs.

Achhru Ram J. — I agree.

R.G.D.

Appeals dismissed.

[C. N. 6.]

A. I. R. (35) 1948 East Punjab 14

ACHHRU RAM AND KHOSLA JJ.

Sardarni Chanan Kaur and others — Plaintiffs—Appellants v. Mohan Lal Goela and others—Defendants—Respondents.

First Appeal No. 262 of 1945, Decided on 28-10-1947, from decree of Sub-Judge, First Class, Delhi, D/- 28-2-1945.

(a) Punjab Pre-emption Act (1913), S. 8—Notification in respect of sales already taken place is not ultra vires.

Section 8 also contemplates promulgation of a notification in respect of a sale that had already taken place so as to take away a right of pre-emption that had already accrued. [Para 2]

(b) Civil P. C. (1908), O. 21 R. 65—Sale by public auction—Reservation of right not to accept highest bid—Sale is by public auction, when in fact highest bid is accepted—Receipt of offer subsequent to auction—Effect.

Where the notice of sale distinctly stated that the property was to be sold by public auction and the conditions of sale were embodied in the said notice, the reservation of the right not to accept the highest bid cannot possibly make the sale, when the highest bid is in fact accepted, a sale otherwise than by public auction. Nor does the receipt of an offer subsequent to the auction alter the character of the sale, even if the subsequent offer was not a voluntary offer, if as a result of this offer the officer did not refuse to accept the highest bid. [Para 3]

Annotation:—('44-Com) Civil P. C. O. 21 R. 65 N. 3.

Harnam Singh and Harbans Singh Gujral—for Appellants.

Bishan Narain and Labh Singh—for Respondents.

Achhru Ram J.—This is an appeal from the decree of a Subordinate Judge of Delhi dismissing the appellants' suit to pre-empt a sale of certain landed property by the Court of Wards of the estate of the heirs of R. B. Buta Singh of Rawalpindi. The land sold was situate in Delhi and was sold to Mohan Lal respondent for a sum of rupees one lac and fifteen thousand. The suit was dismissed on the ground that the sale sought to be pre-empted had been effected by means of public auction and that in view of the notification issued by the Chief Commissioner of Delhi on 26-11-1943 and published in the Gazette of India dated 4-12-1943 it was not pre-emptible.

[2] In arguing this appeal, Mr. Harnam Singh, the learned counsel for the appellants, contended that the notification issued by the Chief Commissioner was not authorised by the language of S. 8, Punjab Pre-emption Act, under which it purported to have been issued and that in promulgating it the Chief Commissioner had exceeded his legal powers. It was urged by the learned counsel that the aforesaid section did not empower the Local Government to issue a notification in respect of a sale that had already taken place so as to take away a right of pre-emption that had already accrued, and that accordingly the notification now in question in so far as it professes to affect sales that took place before its promulgation must be held to be *ultra vires*. After a careful consideration of the language of the section, however, I find myself unable to accept this contention. The section reads as follows:

"The Local Government may declare by notification that in any local area or with respect to any land or property or class of land or property or with respect to any sale or class of sales, no right of pre-emption or only such limited right as the Local Government may specify, shall exist."

The section in very clear terms empowers the Local Government to declare with respect to any sale that no right of pre-emption or only a limited right such as may be specified by it shall exist. The Local Government has been given the power to make such a declaration not only in respect of any class of sales but also with respect to a particular sale and it is obvious that where the declaration is made in respect of a particular sale the sale must have preceded the promulgation of the notification. The section, therefore, clearly contemplates the promulgation of a notification in respect of sales that have already been completed and it cannot, accordingly, be urged that a notification with a retrospective operation is outside the scope of the section.

[3] The second contention of Mr. Harnam Singh was that the sale sought to be pre-empted in the present suit is not in fact a sale by public auction and was not, therefore, saved by the notification relied on by the learned Subordinate Judge. This contention is equally without force. Ex. P. C./3 printed at page 38 is a copy of the notice issued by the Deputy Commissioner in charge Court of Wards of the estate of R. B. Buta Singh in respect of the sale of the land in dispute. The notice distinctly stated that the property was to be sold by public auction on 22-5-1942 at 8 A. M. Conditions of the sale were also embodied in the aforesaid notice. It is not disputed that a public auction was held at which bids were offered by different people, the bid of Mohan Lal respondent being the highest. What is urged is that according to the conditions of the sale as given in Ex. P. C./3 and as otherwise admitted the Court of Wards was not bound to accept the highest bid and that the evidence given by Mr. Askwith, Chief Commissioner, shows that very probably he received some kind of an offer after the auction. These facts, however, do not make the sale sought to be pre-empted any the less a sale by public auction. The reservation to Court of Wards of the right not to accept the highest bid cannot possibly make the sale when the highest bid is in fact accepted a sale otherwise than by public auction nor does the receipt by the Chief Commissioner of an offer subsequent to the auction alter the character of the sale. Even if the subsequent offer was not a purely voluntary offer and can be assumed to have been made in pursuance of some kind of invitation by the officer concerned, it might be that the offer was invited in order to enable that officer to make up his mind whether or not to accept the highest bid as given at the auction. If as a result of this offer that officer had refused to accept the highest bid and instead of ordering re-sale of the property by another auction had sold the property to the person giving

the offer that would certainly be a sale by means of private treaty and not a sale by public auction. When, however, the highest bid given at the auction is actually accepted, the mere fact of such an offer having been asked for or having been made cannot make the sale to the highest bidder a sale by private treaty. For the reasons given above, I see no force in this appeal and dismiss the same with costs.

[4] **Khosla J.** — I agree.

R.G.D.

Appeal dismissed

— — —
[C. N. 7.]

A. I. R. (35) 1948 East Punjab 15

BEHANDARI AND FALSHAW JJ.

Emperor v. K. S. Abdul Latif—Respondent

Criminal Appeal No. 853 of 1946, Decided on 15-12-1947, from order of Magistrate, 1st class, Delhi, D/- 28-6-1946.

Factories Act (1934), Ss. 47, 44(2)—Provisions of S. 47 are subject to S. 44(2).

Under S. 44(2), before a person can be required to work in a factory in contravention of the provisions of Ss. 34 to 40 the manager of the factory must establish to the satisfaction of the Court that he has been exempted from the provisions of the said sections by a written order of the Provincial Government, or that of the Chief Inspector of Factories. The manager of a factory cannot require his employees to work overtime unless he has obtained the necessary permission from the appropriate authorities. The fact that he has paid extra remuneration under the provisions of S. 47, is no defence at all to a charge under Ss. 34 and 36 read with S. 60. The provisions of S. 47 are clearly subject to the provisions of sub-s. (2) of S. 44. (Para 5)

B. K. Khanna, Advocate General—for the Crown.

Gurdev Singh—for Respondent.

Bhandari J.—This is an appeal by the Provincial Government against an order of a Magistrate of the first class at Delhi, acquitting the respondent of offences under Ss. 34 and 36 of the Factories Act, 1934.

[2] On 26th February 1946, Mr. N. R. Mohindra, Inspector of Factories, inspected the factory known as Latifi Press Limited, Delhi, of which the respondent K. S. Abdul Latif is the managing Director. He found (a) that the factory had not been provided with First Aid appliances; (b) that two workers had been allowed to work for more than 54 hours during the week ending with 9th February 1946; and (c) that one worker had been allowed to work for more than ten hours on 3rd, 4th, 9th and 17th February 1946, and another worker had been allowed to work for more than ten hours on 9th February 1946. As a result of the prosecution which followed K. S. Abdul Latif was convicted under S. 32 (v) of the Factories Act for having failed to provide First Aid appliances in contravention of the provisions of the said section and sentenced to pay a fine of Rs. 30. While acquit-

ting him of the charges under ss. 34 and 36 of the said Act the learned Magistrate observed as follows:

"However as regards the extra work done by some of the workers in this factory, the Inspector of Factories has admitted that the workers were paid for that extra work. It is quite in accordance with S. 47 of the Factories Act and hence it does not constitute any offence. So this charge fails against the respondent."

[3] The first question which falls to be determined in this appeal is whether certain workers were in fact allowed to work in the factory in excess of the periods specified under the appropriate provisions of the Factories Act. Mr. Mohindra has come into the witness box to specify the number of workers who were required to work overtime and the dates on which they were so required. The respondent was asked whether the allegation made by Mr. Mohindra was correct. Instead of stating clearly that it was not, he took refuge under the convenient phrase "It is not admitted" No registers were produced in Court from which it could be seen whether the workers were or were not allowed to work overtime. Mohammad Karamat Ullah Usman manager of the Latifi Press, who appeared for the defence declared:

"We do not get extra work from the workers so far as possible. Even if it so happens by chance they are paid remuneration therefor."

[4] The evidence of the Inspector which stands un rebutted on the record makes it quite clear that certain employees were made to work overtime although they were paid extra remuneration for the work done by them.

[5] Assuming for the sake of argument that the employees were given extra pay for the work done by them, the question arises whether the respondent has not contravened the provisions of ss. 34 and 36 of the Factories Act. Section 34 provides that no adult worker shall be allowed to work in a factory for more than 54 hours in any week, or, where the factory is a seasonal one, for more than 60 hours in any week. Section 36 enacts that no adult worker shall be allowed to work in a factory for more than ten hours in any day. These sections are, however, subject to the provisions of sub-s. (2) of S. 44 of the said Act, according to which the Provincial Government, or subject to the control of the Provincial Government the Chief Inspector, may by written order exempt, on such conditions as it or he may deem it expedient, any or all of the adult workers in any factory from any or all of the provisions of ss. 34 to 40, on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work. The language of the sub-section makes it quite clear that before a person can be required to work in a factory in contravention of the

provisions of ss. 34 to 40 of the Factories Act, the manager of the factory must establish to the satisfaction of the Court that he has been exempted from the provisions of the said sections by a written order of the Provincial Government, or that of the Chief Inspector of Factories. The manager of a factory cannot require his employees to work overtime unless he has obtained the necessary permission from the appropriate authorities. The fact that he has paid extra remuneration under the provisions of S. 47. is, in my opinion, no defence at all to a charge under ss. 34 and 36 of the Factories Act read with S. 60 of the said Act. The provisions of S. 47 are clearly subject to the provisions of sub-s. (2) of S. 44 of the Act. It could never be in the contemplation of the framers of the statute that the manager of a factory should be at liberty to make his employees work overtime without obtaining the sanction of the appropriate authority. Had the Legislature intended that the manager of a factory should be at liberty to make his employees work for periods in excess of the periods specified in the statute on condition only that extra wages should be paid to them for the extra work done, it would have been completely unnecessary for it to provide in S. 44 that exemptions can be allowed only by the Provincial Government or subject to the control of the Provincial Government, by the Chief Inspector.

[6] The prosecution have, in my opinion, established beyond reasonable doubt (a) that certain persons were allowed to work in the Latifi Press in excess of the periods specified in ss. 34 and 36 of the Factories Act; (b) that the sanction of the appropriate authority was not obtained as required by S. 44(2) of the said Act; and (c) that they were given extra pay for the extra work done. As the permission of the appropriate authority was not obtained, the respondent is clearly guilty of having contravened the provisions of ss. 34 and 36 of the Factories Act and is liable to punishment under S. 60(b) of the said Act.

[7] For these reasons I would accept the appeal preferred by the Provincial Government, convict the respondent under S. 60(b) of the Factories Act and sentence him to pay a fine of Rs. 100 or in default to undergo a fortnight's simple imprisonment. This sentence will be in addition to the sentence of fine awarded by the Court below in respect of the contravention of the provisions of S. 32(v) of the Factories Act.

Falshaw J.—I agree.

R.G.D.

Appeal allowed.

A. I. R. (35) 1948 East Punjab 17 [C. N. 8.]

ACHHRU RAM AND KHOSLA JJ.

Sundar Singh — Plaintiff — Appellant
v. Lachhman Singh and others — Defendants
— Respondents.

First Appeal No. 333 of 1945, Decided on 18-11-1947, from decree of Sub-Judge, 1st Class, Gurdaspur, D/-19-5-1945.

T. P. Act (1882), S. 60 — Clog on equity of redemption — Clogging provision has no binding force even against assigns from mortgagor.

Where a provision in a mortgage deed, being a clog on the equity of redemption, is void and unenforceable against the original mortgagor, it can have no more binding force against the assigns of the said mortgagor be that assign a purchaser or mortgagee of his right, than it had against the mortgagor himself. A distinction has to be drawn between provisions of general validity avoided against the mortgagor personally by reason of pressure or undue influence brought to bear upon him and provisions which when forming part of the actual mortgage contract had under the general law no validity at all, 17 A. I. R. 1930 P. C. 142, *Rel. on*; 12 A. I. R. 1925 Lah. 45, *held not good law*. [Para 4]

Annotation:—('45-Com) T. P. Act S. 60 N. 38.

Cases referred:—

1. ('30) 11 Lah. 251 : 17 A. I. R. 1930 P. C. 142 : 57 I. A. 168 : 123 I. C. 554 (P C), *Mehrban Khan v. Makhna*.
2. ('25) 12 A. I. R. 1925 Lah. 45 : 75 I. C. 877, *Rahmat Ali v. Shadi Ram*.

Labh Singh for J. L. Kapur—for Appellant.

Panna Lal Behal—for Respondents.

Achhru Ram J.—This is an appeal from the decree of a Subordinate Judge of Gurdaspur dismissing the plaintiff's suit for possession by redemption of 52 *kanals* and 13 *marlas* of land situate in the village of Jaura Singha in Batala Tahsil in the district of Gurdaspur.

[2] The suit land belonged to one Ishar Das son of Jawahar Singh who mortgaged the same with possession to Lachhman Singh defendant 1, for a sum of Rs. 5,096 by means of mortgage deed dated 28th July 1920. This mortgage deed is Ex. D-1 and is printed at page 79 of the paper book. According to the terms of mortgage deed, the mortgagee was to receive a sum of Rs. 400 per annum as interest in addition to the rents and profits of the land mortgaged and the mortgagor was to have no right to redeem the mortgage for a period of forty years. Lachhman Singh mortgagee sold one-half share of his mortgagee rights to Ghamanda Singh, defendant 2, and 1/3rd of these rights to Udharn Singh and Balwant Singh, defendants 3 and 4. Ishar Das mortgagor died without leaving any child or widow and was succeeded by Devi Das, defendant 5. On 21st February 1943 the aforesaid Devi Das mortgaged with possession the land in dispute with the plaintiff for a sum of Rs. 7,800. Out of the consideration for this mortgage a sum of Rs. 5,100 was left with the plaintiff for redemption of the mort-

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gage effected by Ishar Das in 1920. After making an unsuccessful application to the Collector for redemption of the suit land under the Redemption of Mortgages Act the plaintiff, on 17th November 1943, brought the suit which has given rise to the present appeal. The suit was resisted by defendants 1 to 4 *inter alia* on the plea that the plaintiff could not redeem the mortgage before the expiration of the stipulated period of forty years. The plaintiff alleged that the stipulation postponing redemption of the mortgage for a period of forty years was in the nature of a clog on the equity of redemption and was not therefore enforceable. This allegation of the plaintiff was met with the plea that he being merely a mortgagee from the representative-in-interest of the original mortgagor and having taken his mortgage with full knowledge of the stipulation postponing redemption, could not, under the law, be permitted to plead that the stipulation was in the nature of a clog on the right of redemption and was not therefore enforceable. On the pleadings of the parties, the learned trial Judge framed the following issues:

- (1) Was the mortgage deed Ex. P-1 executed without consideration?
- (2) Was defendant 5 under the influence of liquor when he executed the mortgage deed Ex. P. 1, if so what was its effect?
- (3) Did defendant 5 validly mortgage the land in suit in favour of the plaintiff?
- (4) If issue No. 3 be proved then has not the plaintiff *locus standi* to plead that the conditions fixing the period for redemption and for payment of interest in the mortgage Ex. D 1 were void?
- (5) Could not the plaintiff challenge the said conditions on account of the law of limitation?
- (6) If issues Nos. 4 and 5 be not proved then were the said conditions void as being a clog on the equity of redemption?
- (7) Relief?

[3] The first three issues were decided by the learned Judge in the plaintiff's favour. The fourth issue was, however, decided against him, it being held that he being merely a mortgagee of the interest of defendant 5 could not object to the validity of the conditions postponing redemption for a period of forty years and imposing on the mortgagor the liability to pay interest at the rate of Rs. 400 per annum in addition to the rents and profits of the mortgaged property. The fifth issue was decided in the plaintiff's favour. No decision was given on the sixth issue. In view of the decision on the fourth issue the plaintiff's suit was dismissed as premature and incompetent. The plaintiff has come up in appeal to this Court.

[4] After hearing the learned counsel for the respondents, I find myself unable to uphold the decision of the learned trial Judge on the fourth issue. In 11 Lah. 251¹ their Lordships of the

Judicial Committee have held that where a provision in a mortgage deed, being a clog on the equity of redemption, is void and unenforceable against the original mortgagor, it can have no more binding force against the assign of the said mortgagor than it had against the mortgagor himself. A distinction was drawn by their Lordships between provisions of general validity avoided against the mortgagor personally by reason of pressure or undue influence brought to bear upon him and provisions which when forming part of the actual mortgage contract had under the general law no validity at all. Their Lordships were pleased to point out that if such a distinction was not drawn an illogical result would follow, and that the mortgagor while redeeming personally would escape from the burden but would have to bear the same burden in case he assigned his right to another because the validity of the provisions as against the assign was bound to be reflected in the consideration for the assignment. The learned trial Judge has sought to distinguish the present case from the judgment of their Lordships of the Judicial Committee on the ground that the assignment by the mortgagor in the present case took the shape of a mortgage while the assign suing to redeem the mortgage in the case dealt with by their Lordships was the purchaser of the equity of redemption. On principle, however, I can see no distinction between the two cases. Where a provision in the mortgage deed by reason of being a clog on the equity of redemption is altogether void and wholly unenforceable, it must be held to be so whether it is the original mortgagor who seeks to redeem the mortgage by ignoring the provision or it is an assign of his, be that assign a purchaser or mortgagee of his right, who seeks to do so. If the provision is void and unenforceable against the mortgagor it does not cease to be so merely because the mortgagor instead of redeeming the mortgage himself has left it to a subsequent mortgagee from himself to do so. The decisions of the High Court of Lahore and the Chief Court of the Punjab that have been relied on by the learned Judge were given in cases in which the validity of certain provisions in the mortgage deed was attacked on the ground of coercion or undue influence having been brought to bear upon the original mortgagor. All that was held in these cases was that the provisions being only voidable at the instance of the original mortgagor his transferee who had purchased his rights subject to those provisions could not be permitted to go behind them or to challenge them. As observed by their Lordships, cases of this type stand on a footing entirely different from those in which the mortgagor or his successor in-

interest claims the right to ignore a provision in the mortgage deed on the ground of its being a clog on the equity of redemption and therefore wholly void and unenforceable. It is true that in A. I. R. 1925 Lah. 45² the condition in the mortgage deed was alleged to be a clog on the equity of redemption and still it was held that the transferee of the equity of redemption could not be granted any relief on that ground. This decision cannot be regarded as laying down correct law in view of the decision of their Lordships of the Judicial Committee.

[5] For the reasons given above, I would accept this appeal and setting aside the decree of the learned trial Judge dismissing the plaintiff's suit as premature would remit the case to him for a fresh decision according to law after deciding issue No. 6. Costs of this appeal will be costs in the cause. The parties have been directed to appear in the trial Court on 5th January 1948.

Khosla J.—I agree.

R.G.D.

Appeal allowed.

A. I. R. (35) 1948 East Punjab 18 [C. N. 9.]

BHANDARI AND ACHHRU RAM JJ.

Ramji Lal and others—Plaintiffs—Appellants v. Pitam Chand—Defendant—Respondent.

First Appeal No. 164 of 1945, Decided on 4-11-1947, from decree of Sub-Judge, 1st Class, Delhi, D/- 14-2-1945.

Civil P. C. (1908), O. 8, R. 2 — Suit against pujari for declaration that temple is public wakf—Assertion by defendant that it was private property and income from it, private income — Suit for his removal on the basis of this assertion cannot lie.

In a suit against a pujari of a temple for a declaration that the temple is a public wakf, the defendant pleaded that this temple and the land attached thereto were his private *jagir* and that the income derived therefrom was his private income. The suit was decreed, the Court holding that the temple and the land attached thereto were public wakf properties. In a subsequent suit filed against the pujari for his removal on the ground of his mismanagement and breach of trust, it was contended that the assertion by the defendant of a private claim and the denial of the existence of a public trust, in the previous suit were sufficient in themselves to justify the removal of the defendant:

Held, that it was open to the defendant to defeat the plaintiff's claim by all means in his power and the fact that he chose a particular means would not entitle the plaintiffs to bring a fresh suit against him.

[Para 3]

Annotation;—('44-Com) Civil P. C., O. 8 R. 2, N. 1.

Asa Ram Aggarwal — for Appellants.

Shamsher Bahadur — for Respondent.

Bhandari J.—The short point for decision in this case is whether the defendant who is a *pujari* of a temple, has been guilty of breach of trust and misappropriation of trust money or of mismanagement of trust property. On 27th June 1937, Ramji Lal and Durga Das, who are residents of the mohalla in which the

temple known as Mandir Kanhaya Lal Bhola Nath or Shivala Dina Nath is situated, brought a suit against Pitam Chand Pujari for a declaration that the temple in dispute together with the land attached thereto is a public *wakf* and for a perpetual injunction restraining the defendant from asserting his private ownership and from applying the income of the temple to his private use. The trial Court held (a) that the temple and the land attached thereto are *public wakf* properties; (b) that the said temple and land have been in the exclusive management of the defendant and his ancestors for about a century; and (c) that the defendant is a hereditary *pujari* of the said temple and property and could not be regarded as owner thereof. On these findings the trial Court granted a decree to the plaintiffs and this decree was confirmed by the High Court on 27th September 1940.

[2] On 16th March 1943, Ramji Lal and three other residents of the Sadar Bazar, Delhi, brought a suit against the defendant in which it was alleged that the defendant had mismanaged the property, had hindered public worship in the temple and had committed breach of trust and had misappropriated property to the extent of Rs. 300 per mensem. It was accordingly prayed: (a) that the defendant be removed from the post of *pujari*; (b) that a committee of management be appointed; (c) that the scheme of management be framed; and (d) that the defendant be ordered to render account of the income. The trial Court came to the conclusion that the plaintiffs had failed to establish the charges against the defendant and dismissed the suit with costs. The plaintiffs are dissatisfied with the order and have come to this Court in first appeal.

[3] The principal ground for the defendant's removal from the post of *pujari* was that in the first suit brought against him by the worshippers of the mohalla he had pleaded that this temple and the land attached thereto were his private *jagir* and that the income derived therefrom was his private income. This assertion of a private claim and the denial of the existence of a public trust, it was alleged, were sufficient in themselves to justify the removal of the defendant. The trial Court has pointed out, and in my opinion with perfect justification, that it was open to the defendant to defeat the plaintiffs' claim by all means in his power and the fact that he chose a particular means would not entitle the plaintiffs to bring a fresh suit against him.

[4] The plaintiffs have examined a large number of witnesses in order to establish the

charges of mismanagement, misappropriation and even breach of trust. (After reviewing the evidence, his Lordship continued.) The flimsy evidence that has been produced in this case is not, in my opinion, sufficient to establish a charge of mismanagement much less of misappropriation or criminal breach of trust. I have no hesitation in holding that the plaintiffs have failed to discharge the onus that rested on them.

[5] The defendant, on the other hand, has completely rebutted the allegations made against him. The witnesses who have appeared for him, most of whom are respectable inhabitants of the *ilaga*, have categorically denied the assertion that the people play cards or wrestle inside the premises of the temple. The defendant has filed a long written statement in which he prays that as he has recently attained majority and has been doing his best to manage his property, he should be allowed the opportunity of managing the temple without interference from others.

[6] After going carefully through the records of the case and hearing the arguments which have been addressed to us, I have no doubt in my mind that there is no substance in the pleas put forward by the plaintiffs. In any case the suit appears to me to be premature, for the defendant has only recently attained majority and has not had a fair opportunity of managing the temple.

[7] For these reasons I would confirm the order of the Court below and dismiss the appeal with costs. The plaintiffs are not entitled to call upon the defendant to render accounts. It is open to them, if they so desire, to make an application to the District Judge under the appropriate provisions of the Endowments Act.

Achhru Ram J.— I agree.

R.G.D.

Appeal dismissed.

A.I.R. (35) 1948 East Punjab 19 [C. N. 10.]

BHANDARI J.

Mangal Singh Badan Singh—Plaintiff — Appellant v. Bhag Singh and others — Defendants — Respondents.

Second Appeal No. 537 of 1946, Decided on 10-1-1948, from decree of District Judge, Ludhiana, D/- 12-11-1945.

Pre-emption — Partial — Collaterals of vendor having equal rights to pre-empt — One of them agreeing to purchase part of property from vendee, allowing latter to retain remaining portion — Action amounts to waiver of right of pre-emption — Other collaterals can pre-empt the whole of property including portion sold by the vendee — Punjab Pre-emption Act (1 of 1913), S. 17.

The right of pre-emption is not a right of re-purchase either from the vendor or the vendee, involving

a new contract of sale, but simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It follows as a consequence that ordinarily the pre-emptor must take over the whole and not only a part of the property which he is entitled to pre-empt.

[Para 3]

A sold a plot of land measuring 17 bighas odd to B. K and S two of the collaterals of A in assertion of their right of pre-emption purchased 9 bighas of the land from B, B promising to transfer rest of the land in due course. G and N who were other collaterals of A with rights of pre-emption equal to those of K and S, sued B for pre-emption:

Held that by agreeing to purchase a portion of the land allowing the rest to remain with vendee B, K and S had clearly waived their right to pre-empt the land. They had no power by purchasing only a part of the land and by leaving the rest with a stranger vendee to deprive the other pre-emptors of their right to pre-empt the whole bargain, that is the whole of 17 bighas odd land: 106 P. R. 1880 and 34 P. R. 1903, *Foll.*; 11 A. I. R. 1924 Lah. 431; 20 A. I. R. 1933 Lah. 774 and 10 P. R. 1909, *Disting.* [Paras 8, 10]

Cases referred:—

1. ('80) 106 P. R. 1880, Fateh Chand v. Nihal Singh.
2. ('03) 34 P. R. 1903, Ralla v. Dayal.
3. ('09) 10 P. R. 1909: 1 I. C. 397, Banarsi Das v. Hazi Abdul Ghani.
4. ('24) 5 Lah. 80: 11 A. I. R. 1924 Lah. 431; 80 I. C. 960, Uderam v. Atma Ram.
5. ('33) 20 A. I. R. 1933 Lah. 774: 14 Lah. 810: 145 I. C. 629, Tirath Ram v. Dina Nath.

M. L. Sethi — for Appellant.

Jhanda Singh — for Respondents.

Judgment. — The short point for decision in this case is whether it is open to a pre-emptor to exclude another pre-emptor by entering into an agreement with a stranger vendee to purchase only a part of the property in respect of which the right of pre-emption exists. It appears that on 6-2-1944 one Bishan Singh sold a plot of land measuring 17 bighas 9 biswas and 14 biswansis to Bhag Singh for a sum of Rs. 9,500. On 18-8-1944 Kapur Singh and Bahadur Singh, two collaterals of the vendor, purchased a portion of this land (measuring 9 bighas 3 biswas and 19 biswansis) for a sum of Rs. 5,000 in assertion of their right of pre-emption. The sale in favour of Bhag Singh gave rise to three suits for possession by pre-emption each of which was brought by one or more of the collaterals of the vendor. The first suit was brought by Mangal Singh on 15-8-1944; the second by Mal Singh on 20-10-1944 and the third by Kapur Singh and Bahadur Singh on 9-1-1945. The plaintiffs in the last case alleged that as soon as they were informed of the sale in favour of Bhag Singh, they threatened to exercise their right of pre-emption. The vendee promptly transferred 9 bighas 3 biswas and 19 biswansis to them promising to transfer the remaining land in due course. He failed to carry out his promise and the plaintiffs were accordingly reluctantly compelled to sue for

possession of 8 bighas 5 biswas and 15 biswansis. The trial Court held that the right of pre-emption of each of the three sets of pre-emptors was equal, that Kapur Singh and Bahadur Singh obtained a portion of the land in exercise of their right of pre-emption, that this sale was binding on Mangal Singh and Mal Singh and that the suit brought by Kapur Singh and Bahadur Singh was an afterthought having been instituted with the object of injuring the rights of the other pre-emptors. On these findings the trial Court dismissed the suit of Kapur Singh and Bahadur Singh and passed a decree for possession by pre-emption of 8 bighas 5 biswas and 15 biswansis in equal shares in favour of Mangal Singh and Mal Singh. It was ordered that if either of the two pre-emptors did not deposit his share of the pre-emption money within the time fixed by the Court, the other pre-emptor would be at liberty to deposit the money and obtain a decree for the entire land. The learned District Judge confirmed this order in appeal making a slight alteration in the amount which the pre-emptors were required to pay. Mangal Singh has come to this Court in second appeal and the question for this Court is whether the Courts below have come to a correct determination in point of law.

[2] The only question which requires decision in this case is whether the Courts below were justified in dismissing the appellant's suit in respect of the land which had been sold to Kapur Singh and Bahadur Singh.

[3] It is an accepted proposition of law that the right of pre-emption is not a right of repurchase either from the vendor or the vendee, involving a new contract of sale, but simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It follows as a consequence that ordinarily the pre-emptor must take over the whole and not only a part of the property which he is entitled to pre-empt.

[4] Mr. M. L. Sethi, who appears for the appellant in this case contends that as Kapur Singh and Bahadur Singh, who had a right to pre-empt the whole of the property, agreed to purchase only a part of it leaving the rest with the vendee who was a stranger, it was not open to them to assert the right of pre-emption in respect of the whole. On the other hand, by abandoning their right to the whole they had also abandoned their right to the part. The transaction into which they had entered was not one of possession by pre-emption. It was really a new transaction involving a new contract of

sale between the vendee and the pre-emptor. It could not by any stretch of meaning be regarded as having been entered into in exercise of the right of pre-emption. My attention has been invited to a number of authorities which endorse the proposition that a pre-emptor, who purchases only a part of the property, must run the risk of losing even that portion if another pre-emptor chooses to take over the bargain as it stood at the time of the sale.

[5] The first of these authorities is reported in 106 P. R. 1880.¹ In this case, one Sher Singh sold half a house to Devi Ditta on 23rd March 1878, and a few days afterwards Devi Ditta sold a portion of this house to Nihal Singh. On 21st January 1879, the plaintiff sued for pre-emption of the half house sold to Devi Ditta and the Courts gave him a decree except as regards the portion subsequently re-sold to Nihal Singh on the ground that although the plaintiff had a superior right to Devi Ditta, his right was inferior to that of Nihal Singh whose house adjoined that in dispute. A Division Bench of the Punjab Chief Court accepted the plaintiff's appeal. It held that the right of pre-emption is a right to take over a sale bargain in its entirety, and if a pre-emptor suffers another person to purchase, and is content to accept a derivative title from him with respect to a portion only of the premises sold, being unwilling to buy the rest, he must be held to abide the consequences of losing even that portion, if another person having a superior right to that of the vendor, claims to assert his right to take over the original bargain as a whole. The learned Judges expressed the view that in such a case the sub-purchaser is estopped from asserting the right he has once waived of acquiring the property sold against another person whose claim to pre-emption, though inferior to his own, is still superior to that of the first purchaser. They held further that the original contract of sale was one and indivisible and in such a case it was not open to the pre-emptor to have the bargain divided. Having once waived his right with respect to the bargain as a whole he was not at liberty afterwards to assert it with respect to a part.

[6] The next authority on which reliance is placed is reported in 34 P. R. 1903.² In this case, a pre-emptor with superior rights agreed with a vendee, who was a stranger, that in consideration of his receiving a portion of the property sold he would waive his objections to the sale. The Chief Court held that as the transaction was equivalent to that of taking over only a portion of the original bargain or associating a stranger in the purchase, it was not permissible by law and could not, therefore, defeat the rights of other pre-emptors.

[7] In the third authority which is reported in 10 P. R. 1909³ another Division Bench of the same Court held that a person who under the provisions of the pre-emption law, is entitled to pre-empt the entire bargain that is part of the property sold under one clause, and the remainder under another clause of the Pre-emption Act, forfeits his right altogether, if he sues only for one portion and in such a case where in spite of the defendant's objections to the contrary he persists in a suit as laid he is not entitled to amend his plaint.

[8] In view of the above authorities which are amply supported by decisions of the Allahabad High Court it is abundantly clear that Kapur Singh and Bahadur Singh, who agreed to purchase a part of the land which had been sold to Bhag Singh, had clearly abandoned their rights to pre-empt the property. *Prima facie*, therefore, the finding of the Courts below to the effect that Mangal Singh and Mal Singh could pre-empt only the land which had not been purchased by Kapur Singh and Bahadur Singh cannot be upheld.

[9] S. S. Jhanda Singh, who appears for the respondents, contends that whatever the law might have been up to the year 1909, there was a considerable change subsequent to that year. He invites my attention to two authorities of the Lahore High Court in which a different view is alleged to have been taken. The first of these authorities is reported in 5 Lah. 80.⁴ In this case, one Ram Singh sold certain house property to Atma Singh and Janki Das. A few months later Janki Das sold his half share to Atma Ram and on the same day Atma Ram sold a portion of the property to Mukand Singh on the latter asserting his right of pre-emption. Udhe Ram and another then brought a suit for pre-emption of the part which Atma Ram had not sold to Mukand Singh. The first Court decreed the claim but the District Judge on appeal held that Mukand Singh not having pressed his claim to the whole of the property sold had lost his right as a pre-emptor and that the plaintiffs, therefore, could and should have sued for the whole of the property sold and that they were not entitled to pre-empt a part only. Scottsmith and Fforde JJ. held that as Atma Ram had himself broken up the property sold by parting with a portion of it to Mukand Singh who had a right of pre-emption, he had no grievance when the plaintiff sued him for the remainder of the property and this suit was, therefore, competent. They held further that the principle of denying the right of pre-emption except as to the whole of the property sold is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion

of the property and leave the worst part with the vendee. In this particular case the plaintiff was not seeking to pick and choose part of the property in the possession of the vendee. The vendee himself having parted with a portion of the property did not suffer in any way whatsoever by plaintiffs not suing for the whole of it. Here the objection was raised by the vendee who had himself broken up the property and not by the pre-emptors. It will be seen that the facts of this case are entirely distinguishable from the facts of the case which is before me for decision. In A. I. R. 1933 Lah. 774⁵ a pre-emption suit was filed in respect of a sale but the vendee sold the property in equal shares to two other persons who also claimed to be pre-emptors thereof. The sub-vendees were also impleaded in the pre-emption suit and it was contended by the plaintiff that as the pre-emptor, sub-vendees, had not each pre-empted the whole property and as the bargain was split up, they should be deemed to have waived their right of pre-emption. Shadi Lal O. J., who delivered the judgment of the Division Bench, expressed the view that the principle that a pre-emptor whose right extends over the entire property sold must take over the whole of the bargain and that he is not entitled to pre-empt only a part of the property has no application to this case as the vendee himself had broken up the bargain and sold the whole property to two pre-emptors. He held further that a sale of this character did not involve a breaking as contemplated by the general rule.

[10] The facts of the case out of which the present appeal has arisen are, in my opinion, practically on all fours with the cases reported in 106 P. R. 1880¹ and 34 P. R. 1903.² On the fact found by the Courts below that Kapur Singh and Bahadur Singh had really agreed to purchase a portion of the land from Bhag Singh allowing the latter to retain the remaining portion of the land, it seems to me that these two plaintiffs had clearly waived their right to pre-empt the land. They had no power by purchasing only a part of the land and by leaving the rest with a stranger to deprive the other pre-emptors of their right to pre-empt the whole bargain.

[11] For these reasons, I would accept the appeal and grant a decree for possession by pre-emption of 17 bighas 9 biswas and 14 biswansis of land in equal shares in favour of Mangal Singh and Mal Singh on payment of a sum of Rs. 4090-8-0 by each of them on or before 1-4-1948. If either of the two pre-emptors does not deposit his share of the pre-emption money within the time fixed, the other pre-emptor would be entitled to deposit that money on or

before 1-6-1948 and obtain a decree for the whole land. In case neither of these two pre-emptors deposits the money, then these two suits shall stand dismissed. Mangal Singh appellant will be entitled to costs throughout.

R.G.D.

Appeal allowed.

A. I. R. (35) 1948 East Punjab 22 [C.N. 11.]

ACHERU RAM J.

Gurdev Singh and others — Plaintiffs — Appellants v. Dasaundhi and others — Defendants — Respondents.

Second Appeal No. 749 of 1946, Decided on 22-3-1948, from decree of District Judge, Ambala, D/- 4-12-1945.

Custom (Punjab) — Alienation — Ancestral property — Land obtained in lieu of land surrendered in consolidation proceedings — Ancestral portion separate and distinct from non-ancestral — Entire land allotted in lieu cannot be regarded as non-ancestral.

Where a part of a particular plot of land is ancestral, but the whole is not, and the ancestral and the non-ancestral parts are inextricably mixed up, a Court may not hold an undivided share of that plot, proportionate to the ancestral land included therein, as ancestral. Such undivided share will be a share in both ancestral and non-ancestral land and, therefore, a Court cannot characterise it as ancestral without treating as ancestral land which in fact does not bear that stamp.

[Para 8]

This principle cannot, however, be extended to cases in which there has been no such inextricable mixing up of ancestral and non-ancestral land held by a landowner, and all that has taken place is that in lieu of land which was partly ancestral and partly non-ancestral but in which the ancestral and non-ancestral portions were quite separate and distinct from each other, such landowner has got a certain plot of land, either by means of private treaty as in the case of exchange or as a result of the general redistribution of the lands in the estate as in the case of consolidation of holdings. There is no reason why the whole of the land he has so got should be regarded as non-ancestral and why a share of such land bearing the same proportion to the whole as the ancestral portion of his original holding bore to such holding should not be regarded as ancestral.

[Para 9]

It may be that in a particular case the ancestral portion given in exchange or thrown into the hotchpotch may be so small as compared with the non-ancestral portion as to be almost negligible, or it may otherwise be not possible to find out what proportion the ancestral portion bore to the whole. In such a case on grounds of practicability or convenience the whole of the land got in exchange or at redistribution may well have to be regarded as non-ancestral. However where the ancestral portion of the land so given or thrown was by no means negligible and bore a definite proportion to the whole of the land there can be no difficulty in apportioning the land acquired according to the areas of the two classes of such land, namely, ancestral and non-ancestral.

[Para 9]

So also a case may be visualized in which a man gives in exchange, or throws into the hotchpotch, ancestral and non-ancestral lands of different qualities and different values, and accordingly it is not possible to postulate,

possibly without an elaborate inquiry into the relative values of the two classes of land, that a particular and specified proportion of the land that he gets in return represents in value or otherwise the ancestral land given by him. In such an event the Court may not without reason, hold that in the land which forms the subject-matter of the dispute, portions representing ancestral and non-ancestral lands respectively are inextricably mixed up and it is not even possible to tell what proportion one class of land bears to the entire holding, and in the result may have no alternative left but to regard the whole of the land as non-ancestral. However, even in such a case if the non-ancestral land given in exchange or thrown into the hotchpotch is so small in area or value as to be almost negligible, the entire land coming to the owner as a result of the exchange or redistribution, should not be regarded as non-ancestral: 42 P. R. 1910 (P. C.), *Expl. and Disting.*; 48 P. L. R. 536 and R. S. A. No. 27 of 1945, *Rel. on*; 25 A. I. R. 1938 Lah. 180, *Not foll.* [Para 10]

Where out of 36 bighas and 3 biswas of land which the alienor threw into the hotchpotch at the time of the consolidation of holdings, 34 bighas and 15 biswas was ancestral in his hands and only 8 bighas was non-ancestral, a 173/175th share in the land allotted in lieu of it must be held to be ancestral. [Para 13]

Cases referred :—

1. ('38) 25 A. I. R. 1938 Lah. 180 : 178 I. C. 81, *Labh Singh v. Mt. Jasso.*
2. ('46) 48 P. L. R. 536, *Mihan Singh v. Piara Singh.*
3. ('10) 42 P. R. 1910 : 6 I. C. 721 : 35 Cal. 1039 (P. C.), *Atar Singh v. Thakar Singh.*

Mela Ram Aggarwal—for Appellants.

F. C. Mittal—for Respondents.

Judgment. — This second appeal has arisen under the following circumstances. By means of sale deed dated 6.6.1939. Chetu deceased son of Hira Singh and Chuhra defendant 3 sold 36 bighas and 1 biswa of land in suit to defendants 1 and 2 for a consideration of Rs. 3000. Defendants 1 and 2 transferred the land to defendants 4 to 6 by means of exchange. The plaintiffs, the sons of Chuhra, defendant 3, brought the suit, that has given rise to the present second appeal for a declaration to the effect that the sale of the land in suit by their father and the deceased Chetu, a near collateral of theirs, should not affect their reversionary rights after the death of their father Chuhra. It was alleged that the land was ancestral *qua* them and that the sale had been effected without consideration and legal necessity. On the pleadings of the parties the learned trial Judge framed the following issues :

- (1) Is the land in suit ancestral *qua* the plaintiffs?
- (2) Whether the sale was effected for consideration and legal necessity?
- (3) Whether the suit is collusive?
- (4) Relief.

[2] The learned Judge found that the land in suit was divisible into two categories. 34 bighas and 2 biswas of land shown as category 'A' had been allotted to the vendors in the proceedings for consolidation of holdings in lieu of 35 bighas and 3 biswas of land indicated by the

letter 'B' in the judgment. The remaining land fell under category 'A/1'. The learned Judge found the land which the vendors had thrown into the hotchpotch at the time of the consolidation of the holdings, namely, the land indicated by letter 'B' in the judgment, with exception of 8 biswas, to be ancestral in the vendor's hands *qua* the plaintiffs. Finding, however, that 8 biswas out of this land has not been proved to be ancestral he held that the entire 34 bighas and 2 biswas of land allotted to the vendors during the consolidation proceedings must be held to be non-ancestral. Out of the land shown as belonging to category 'A/1' he held only 5 biswas of land comprised in *khasra* number 257 to be ancestral. In view of the fact that necessity for Rs. 400 out of the sale consideration, due to a previous mortgagee was, not being challenged, the learned Judge dismissed the suit, without giving any decision regarding necessity for the rest of the sale consideration, on the ground that only 5 biswas out of 36 bighas and 1 biswa of land sold having been proved to be ancestral, the sale could not be set aside even though the balance of the sale consideration was found to be without any necessity. On appeal by the plaintiffs the learned District Judge upheld the decision of the learned trial Judge and affirmed the decree passed by him dismissing the plaintiff's suit. The plaintiffs have come up in second appeal to this Court.

[3] The finding of the Courts below as to the character of the land comprised in category 'A/1' has not been challenged. The only question that requires determination in the present appeal is whether the Courts below were justified in holding the entire land comprised in category 'A' to be non-ancestral on the ground that out of 35 bighas and 3 biswas of land, in lieu whereof the vendors had got the land comprised in this category, 8 biswas of land had not been proved to be ancestral.

[4] The Courts below have held that inasmuch as the whole of the land thrown by the vendors into the hotchpotch at the time of the consolidation of holdings was not ancestral, the land which was allotted to them in lieu thereof must be regarded as land in which ancestral and non-ancestral lands were inextricably mixed up and that in the result the whole of that land must be held to be non-ancestral. In support of this view they have relied on a judgment of a Division Bench of the High Court of Lahore in A. I. R. 1938 Lah. 180.¹

[5] It is no doubt true that the judgment mentioned above does support the view taken by the Courts below. However, more recently two Division Benches of the same High Court

have not followed the aforesaid decision and have taken a contrary view. One of these cases has been reported in 48 P. L. R. 536.² The judgment of the Division Bench in this case was written by Abdul Rashid J. and Mahajan J. concurred with him. In that case the alienor had surrendered 72 bighas and 14 marlas of land to the revenue authorities for purposes of consolidation. Out of this area 4 kanals and 9 marlas of land was non-ancestral while the rest of the land surrendered by him was ancestral. The area of land awarded to him, as a result of the consolidation proceedings, was 77 kanals and 10 marlas *i. e.* nearly 5 kanals in excess of the area surrendered by him. It was held by the Bench that in the circumstances at least 67 kanals and 15 marlas of the land awarded to the alienor having been so awarded in lieu of ancestral property must be deemed to be ancestral. Their Lordships distinguished A. I. R. 1938 Lah. 180¹ as being based on its own special facts and sought support for their view from the provision to be found in the Punjab Consolidation of Holdings Act of 1936 to the effect that a land owner or a tenant shall have the same right in the holding or land allotted to him in pursuance of a scheme of consolidation as he had in his original holding or tenancy as the case may be. It was held that the alienor did not possess absolute rights of disposal in respect of 67 kanals and 15 marlas of ancestral land that he had surrendered for the purpose of consolidation and that the aforesaid area out of the land involved in the litigation must be taken to have been held by him, after the consolidation proceedings, on the same tenure, subject to the same restrictions, as the ancestral area surrendered by him.

[6] The matter again came up before another Division Bench of which I was a member and of which the other member was again Sir Abdul Rashid Kt. C. J (R. S. A. No. 27 of 1945). The judgment of the Bench was written by me. Unfortunately that judgment has not so far been reported anywhere. In that judgment we, while agreeing with the view taken in the above mentioned case, based our decision on a broader ground, we held that where a land-owner throws into the hotchpotch some ancestral and some non-ancestral land, the land which is allotted to him on redistribution cannot, in its entirety, be regarded as non-ancestral, and that a share of such land bearing to the whole holding the same proportion as the ancestral land bore to the total area thrown by him into the hotchpotch may legitimately be regarded as ancestral. We felt inclined, although it was not really necessary for us to give any decision on the subject to extend the principle also to cases of exchanges

in which part of the land given in exchange was ancestral but the whole was not.

[7] After hearing the learned counsel for the respondents I have not been able to discover any reason for not adhering to the view taken in the judgment referred to above. In the circumstances ordinarily I should have simply followed that decision and should not have considered it necessary to dwell on the subject again at any length. However, in view of that judgment not having been reported so far, and it being at best doubtful whether it would be possible ever to report it and having noticed a lot of confusion of thought in quite a number of judgments of Subordinate Courts — the judgment now under appeal being one instance — as to the circumstances under which a Court can hold even ancestral land to be non-ancestral on the ground of its inability to separate it from non-ancestral land, I propose, in this judgment, to deal with the matter in some detail and to set down what I consider to be the correct rule applicable to cases of this kind.

[8] The leading case on the subject is the Privy Council judgment in 42 P. R. 1910³ in which the evidence simply showed that the alienor had acquired some land by purchase and some by abandonment by certain collaterals. However, the two classes of land had at the time of the alienation got so mixed up that it was impossible to predicate with regard to any particular portion of the land sold whether it fell within the first category or the second. Their Lordships of the Privy Council held that in the circumstances the whole of the land could not but be regarded as non-ancestral. The *ratio decidendi* of the decision is obvious. The plaintiff's right to contest the alienation being confined merely to land which he was able to prove to be ancestral, and he having been found to be unable to lay his hand on any particular portion of the land alienated which could be held to have devolved upon him from an ancestor common to himself and the alienor, the Court had no alternative but to non-suit him in respect of the whole of the land. The facts as given in the report do not show if it was known what proportion the ancestral land bore to the entire land that had been alienated. However, even if that had been known I have no doubt that it would have made no difference at all to the decision of the case. Where a part of a particular plot of land is ancestral, but the whole is not, and the ancestral and the non-ancestral parts are inextricably mixed up, a Court may not hold an undivided share of that plot, proportionate to the ancestral land included therein, as ancestral. Such undivided share will be a share in both ancestral and non-ancestral land and, therefore,

a Court cannot characterise it as ancestral without treating as ancestral land which in fact does not bear that stamp.

[9] The principle of the Privy Council judgment referred to above cannot, however, be extended to cases in which there has been no such inextricable mixing up of ancestral and non-ancestral land held by a land-owner, and all that has taken place is that in lieu of land which was partly ancestral and partly non-ancestral, but in which the ancestral and non-ancestral portions were quite separate and distinct from each other, such land-owner has got a certain plot of land, either by means of private treaty as in the case of exchange, or as a result of the general redistribution of the lands in the estate as in the case of consolidation of holdings. There is no reason why the whole of the land he has so got should be regarded as non-ancestral and why a share of such land bearing the same proportion to the whole as the ancestral portion of his original holding bore to such holding should not be regarded as ancestral. The land which he has got by exchange, or which has been allotted to him at redistribution, has itself not devolved upon him from any ancestor and cannot be regarded as ancestral in the strictest sense of the term. In case of the whole of the land given by him in exchange, or thrown by him into the hotchpotch, (being ancestral?) the whole of the land acquired by him or allotted to him, as the case may be, is to be regarded as ancestral because custom attaches to such land the same character as attached to the land originally belonging to him. If the latter, instead of being ancestral in its entirety, is only partially ancestral, the ancestral portion having however been kept quite separate and distinct from the non-ancestral portion, there can be no reason to regard the land obtained in lieu thereof as an inextricable mixture of ancestral and non-ancestral land and not to hold a share thereof, proportionate to the ancestral land that has been given in exchange or thrown into the hotchpotch, as ancestral. It may be that in a particular case the ancestral portion given in exchange or thrown into the hotchpotch may be so small as compared with the non-ancestral portion as to be almost negligible, or it may otherwise be not possible to find out what proportion the ancestral portion bore to the whole. In such a case on grounds of practicability or convenience the whole of the land got in exchange or at redistribution may well have to be regarded as non-ancestral. However, where the ancestral portion of the land so given or thrown was by no means negligible and bore a definite proportion to the whole of the land there can be no difficulty in apportioning the land acquired according to the

areas of the two classes of such land, namely, ancestral and non-ancestral. I cannot believe that in cases of this type custom ever intended to stamp the whole of the land got in exchange or at redistribution as non-ancestral.

[10] I of course do visualise a case in which a man gives in exchange, or throws into the hotchpotch, ancestral and non-ancestral lands of different qualities and different values, and accordingly it is not possible to postulate, possibly without an elaborate inquiry into the relative values of the two classes of land, that a particular and specified proportion of the land that he gets in return represents in value or otherwise the ancestral land given by him. In such an event the Court may, not without reason, hold that in the land which forms the subject-matter of the dispute, portions representing ancestral and non-ancestral lands respectively are inextricably mixed up and it is not even possible to tell what proportion one class of land bears to the entire holding, and in the result may have no alternative left but to regard the whole of the land as non-ancestral. However, even in such a case if the non-ancestral land given in exchange or thrown into the hotchpotch is so small in area or value as to be almost negligible I would not regard the entire land coming to the owner as a result of the exchange or redistribution as non-ancestral.

[11] Unfortunately in the Subordinate Courts the tendency to deal with the question of the character of the land forming the subject-matter of controversy in a most perfunctory and easy going manner is much too common. I have come across quite a number of cases in which requests for permission to separate, with the help of relevant *shajras*, ancestral and non-ancestral lands appearing to be mixed up by reason of having been included in one field number, but alleged otherwise to maintain their separate existence have been summarily rejected. I can understand and appreciate summary rejection of such requests in cases in which, in view of the circumstances disclosed, the Court can reasonably regard the task of separating the two classes of lands as well-nigh impossible. Where small fragments of ancestral and non-ancestral fields have been thrown together and measured as one field, or where a number of ancestral and non-ancestral fields have been jumbled together and remeasured without any regard to the previous measurements, the fields as previously existing may reasonably be supposed to have lost their identity and the *shajras* will be of little help in demarcating separately the ancestral and the non-ancestral lands. However a case is conceivable where one whole field which was ancestral and another whole field which was non-ancestral were, at a

later settlement, measured together as one field. In such a case it may not be difficult for a revenue expert, who knows his job, to separate one from the other with the help of relevant *shajras*. The task will indeed be an arduous and expensive one, but if any party is prepared to undertake it I can see no reason why he should not be allowed to do so. I do not mean to suggest that in cases of this type the Courts should go out of their way to issue commissions or otherwise undertake elaborate enquiries of their own motion. All I say is that if a party offers to lead evidence in Court with the object of separating ancestral and non-ancestral land apparently mixed up the Courts should not refuse to admit such evidence. In the nature of things the evidence will generally be that of persons calling themselves revenue experts, and like all expert evidence, will require to be scrutinised with more than usual care. That, however, can be no reason for shutting out the evidence.

[12] The tendency to try to find short cuts in the decision of judicial cases, particularly when some difficult question requiring special labour for its proper decision arises, discernible in the case of not only of some of our Subordinate Judges but also amongst some Judges exercising appellate jurisdiction, is most regrettable and must be deprecated. In quite a number of cases I have seen Judges declaring the whole of the land comprised in a holding non-ancestral where a certain undivided share of that holding had been clearly found to be ancestral in character. To regard such a share to be inextricably mixed up with non-ancestral land in the sense in which the expression is used in the Privy Council judgment in 42 P. R. 1910³ is the height of absurdity and it pains one to see Judges of standing and experience falling into the error.

[13] As has been stated above, the Courts below found that out of 35 *bighas* and 3 *biswas* of land which the vendors threw into the hotch-potch at the time of the consolidation of holdings, 34 *bighas* and 15 *biswas* was ancestral in their hands and only 8 *biswas* was non-ancestral. Applying the principle laid down in the two Division Bench judgments of the High Court of Lahore mentioned above, it will appear that a 173/175th share in the 34 *bighas* and 2 *biswas* of land comprised in category 'A' must be held to be ancestral *qua* the plaintiffs.

[14] In view of the above decision I accept this appeal and setting aside the judgments and the decrees of the Courts below remand the case to the learned Subordinate Judge for a decision of the other questions arising in the case in accordance with law.

[15] In the circumstances of the case I leave the parties to bear their own costs incurred up

to the present stage. The parties have been directed to appear in the trial Court on 22-4-1948.

V.B.B.

Appeal allowed.

[Case No. 12.]

A. I. R. (35) 1948 East Punjab 26

ACHHRU RAM AND KHOSLA JJ.

Chiranji Lal — Plaintiff — Appellant v. Ram Kanwar s/o Lakhmichand and others—Defendants—Respondents.

First Appeal No. 270 of 1944, Decided on 20-11-1947, from decree of Sub-Judge, 1st Class, Delhi, D/- 8-7-1944.

(a) Civil P. C. (1908), S. 11 Expl. 6—Final partition decree in suit by Hindu father, based upon compromise — Son impleaded in suit as one of defendants — Son refusing to be party to compromise — His name struck off from list of defendants — He is not bound by compromise decree — Hindu law — Joint family.

A compromise decree cannot bind any person who is not a party to the compromise unless of course it can be held that one of the parties to the compromise had the right or the authority to bind him by means of the same. No party can be said to have either the authority or the right to bind another party by an agreement to which such party has expressly refused to agree.

[Para 5]

Although it is open to a Hindu father to bring a suit for partition of the joint family property without impleading his son and although in such a suit a decree passed on compromise would bind the son yet where the father has in fact impleaded the son as a defendant and got a preliminary consent decree with him as a party, he cannot bind the son by the final decree based on a compromise to which he refused to become a party, after giving him up and after having his name struck off from the list of the defendants.

[Para 5]

Annotation: ('44 Com) Civil P. C. S. 11, N. 61 & 114.

(b) Evidence Act (1872), S. 115 — Compromise partition decree not binding on son — Son taking benefit under decree by sharing property allotted to father — He cannot challenge the compromise decree even though he reserved his right to do it when taking benefit under it.

Where is a suit by a Hindu father for partition of the joint family property, the son is impleaded as one of the defendants and a final decree for partition is passed, the decree is not binding on the son, if he refuses to consent to the compromise and is therefore struck off the list of the defendants.

But where in a subsequent suit by the father against his son, his brother and his mother, for partition of the property fallen to his share by the original compromise partition decree, a compromise decree is passed and the son accepts a certain share out of the property, having thus got the benefit of the decree obtained by his father in the original partition decree he is clearly estopped from challenging the validity of that decree or otherwise seeking to go behind it, even though at the time of compromising with his father he made a reservation in favour of his right to seek such relief as he might under the law be entitled to in respect of the original partition to which he was not a party, and a similar reservation when he appeared in Court when the compromise was sought to be recorded.

[Para 6]

Annotation: ('46-Man) Evidence Act, S. 115 N. 3 (c), 5 and 26.

(c) Civil P. C. (1908), O. 6, R. 2—New plea — Plea of *res judicata*—Plea of estoppel is covered.

The plea of *res judicata* is only a plea of estoppel by judgment and if the defendant is unable to make out one species of estoppel but the circumstances disclosed on the record make out a case of another species of estoppel there is no reasonable ground for refusing relief to him. [Para 7]

Annotation :—('44-Com) Civil P. C., O. 6 R. 2 N. 9.

(d) Civil P. C. (1908), S. 100 — Question of law — Legal effect of compromise is question of law.

[Para 7]

Annotation:—('44-Com) C.P.C., Ss. 100 and 101 N. 30.

(e) Civil P. C. (1908), O. 6, R. 2 — Suit to set aside compromise decree — It cannot be converted to one based on recognition of validity of that decree.

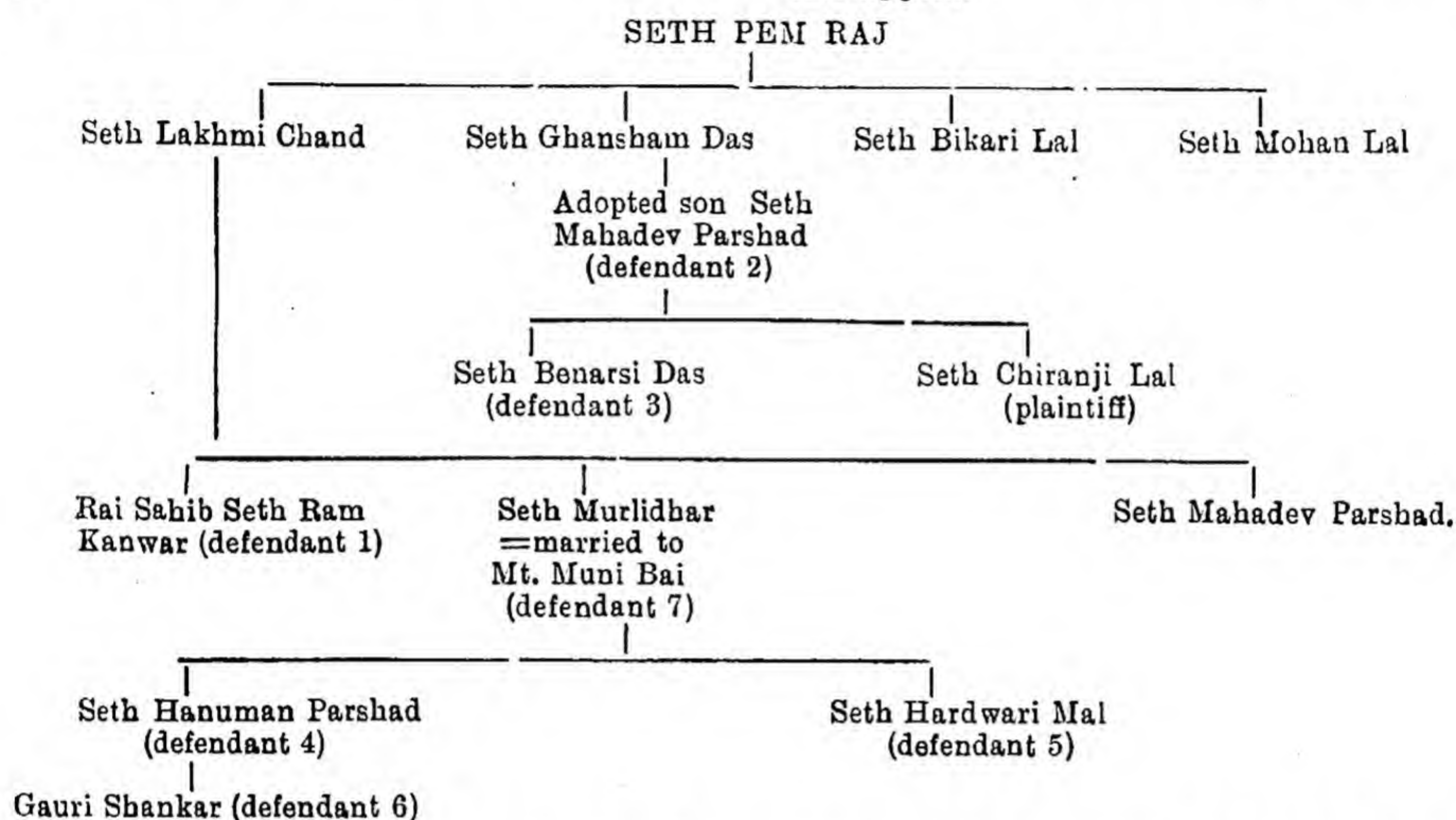
It is not desirable or proper to convert a suit to set aside a partition decree, into a suit based on recognition of the validity of that decree and for a relief flowing from and arising out of that decree. [Para 8]

Annotation :—('44-Com.) Civil P. C., O. 6 R. 2 Ns. 5 and 9.

A. N. Grover — for Appellant.

Bishan Narain and Labh Singh —
for Respondents.

Achhru Ram J. — The following pedigree-table will illustrate the relationship between the parties to the suit which has given rise to this appeal.



Seth Benarsi Das defendant 3 is alleged to have been adopted by R. S. Seth Ram Kanwar defendant 1 although the latter denies this fact.

[2] The family consisting of the descendants of Seth Pem Raj possessed considerable movable and immovable property and were doing extensive business. On 30-8-1903 an arrangement was arrived at between Seth Ghansham Das and his adopted son Seth Mahadev Parshad as one party and Seth Murli Dhar and R. S. Seth Ram Kanwar, the remaining two sons of Lakhmi Chand, as the second party (the lines of Seth Mohan Lal and Seth Bikari Lal having already become extinct) to the effect that in any partition of the joint assets Ghansham Das and his adopted son Seth Mahadev Parshad would be entitled to 22½ per cent. of the total assets and the remaining 77½ per cent. would go to Seth Murli Dhar and R. S. Seth Ram Kanwar.

[3] On 29-8-1937 Seth Mahadev Parshad brought a suit for partition of the joint family property, movable and immovable and the joint business carried on under different names and styles and contrary to the arrangement mentioned above, he claimed a one-half share in the family assets. He impleaded his two sons Seth Benarsi Das and Seth

Chiranji Lal as defendants 3 and 7. He alleged that Seth Benarsi Das had been adopted by R. S. Seth Ram Kanwar. The other defendants to the suit were Seth Murli Dhar, Seth Hanuman Parshad, Seth Hardwari Mal and Seth Gauri Shankar. The suit was resisted mainly by R. S. Seth Ram Kanwar who had been alleged by the plaintiff to be the managing member of the family and accordingly in possession of all the accounts. On 23-11-1938 the parties to the suit entered into a compromise according to which the plaintiff was to get a 22½ per cent. share in the immovable property which formed the subject-matter of the suit excepting two properties which were declared to be *waqf*. It was, however, agreed that the surplus income left after the defrayal of the expenses of one of the two properties declared *waqf* was to be shared by the parties in the same proportion in which they were sharing the rest of the property. The remaining 77½ shares were to go to R. S. Seth Ram Kanwar and Seth Murli Dhar and their descendants. On the basis of this compromise a consent preliminary decree was passed on 23-11-1938. Certain commissioners were appointed in order to effect partition by metes and

bounds. On 2-4-1939 parties other than Seth Chiranji Lal and Seth Benarsi Das who were defendants 7 and 8 respectively entered into a compromise as to the terms in which the final decree was to be passed. The deed of compromise is Ex. P-18 and will be found printed at pages 79 to 82 of the paper-book. It is not necessary to give the details of the arrangement arrived at by the parties to the compromise. On the compromise coming up before the Court for consideration on 6-4-1939 Seth Chiranji Lal refused to accept the same and prayed that either his name might be struck off from the list of the defendants so that the proceedings of the suit might not bind him or he might be transposed as a plaintiff and his share might be separated from the rest of the parties. On the plaintiff's counsel stating that Seth Chiranji Lal and Seth Benarsi Das were really not necessary parties to the suit and that he was prepared to give up the said defendants the Court proceeded to record his statement to the above effect and made an order striking off the names of Seth Chiranji Lal and Seth Benarsi Das from the list of the defendants. The other parties to the suit having compromised a final decree was ordered to be drawn up in the terms of the compromise. This decree is dated 6-4-1939. Some time after this Seth Chiranji Lal brought a suit to avoid the final partition decree mentioned above but his plaint was rejected on his failure to make up the deficiency in the court-fee. On 28-10-1942 Seth Mahadev Parshad brought a suit against his son Seth Chiranji Lal, Balram minor, the son of Seth Chiranji Lal, his second son Benarsi Das and his wife Mt. Rattan Devi for partition of the property that had been allotted to him as a result of the final decree for partition mentioned above. It may be observed that Seth Mahadev Parshad had, in the suit which he brought against R. S. Seth Ram Kanwar etc., in 1937, claimed the full one half share which would have come to his branch of the family including his descendants but for the agreement of 1903, and in the actual partition effected got the full 22½ per cent. share to which that branch was under that agreement entitled. The object of the suit instituted by him in 1942 against his sons, grandson and wife was to have his own share in the joint family property of himself and his sons and grandson which represented the property that had been allotted to him as representing that joint family separated. This suit was settled by means of a compromise on 4-5-1948. The terms of the compromise are to be found in Ex. P-16 which is printed at page 91 of the paper book. Seth Chiranji Lal when examined in Court with reference to the aforesaid compromise made the following statement:

"I have heard the contents of the compromise. They are correct. A decree may be passed in accordance therewith. But this compromise will have no effect as against my rights in respect of which I have brought or I may bring a suit against Seth Ram Kanwar."

The Court passed a final decree for partition in the terms of the compromise.

[4] On 7-8-1948, the plaintiff brought the suit out of which the present appeal has arisen in which he claimed partition of the property and the business which were at one time jointly owned by the family of Seth Ghansham Das and Seth Lakhmi Chand. He claimed an 11½ per cent. share in the whole of the property, and in the alternative, in case Seth Benarsi Das was not held to be the adopted son of R. S. Seth Ram Kanwar, a 7½ per cent. share in the said property. He also claimed a decree for rendition of accounts of the firm Lakhmi Chand Ram Kanwar and Lakhmi Chand Jaipuria for the period from Sambat 1954 up to the date of the institution of the suit and for recovery of the amount of his share. The suit was resisted by defendants 1, 4 and 7. Defendants 2 and 3 who were the own father and brother of the plaintiff supported the claim. The learned Subordinate Judge who tried the suit has dismissed the same holding that its trial was barred by the rule of *res judicata* on account of the final partition decree passed in the previous suit which was brought by Seth Mahadev Parshad against the other members of the family on 29-8-1937. The plaintiff feeling aggrieved from the decree of the learned Subordinate Judge dismissing his suit has come up in appeal to this Court.

[5] In arguing the appeal Mr. Amar Nath Grover, the learned counsel for the appellant, contended that the final decree for partition in the previous suit which was based on a compromise to which the plaintiff was not a party and which was passed after the plaintiff's name had been struck off from the list of the defendants could not bind the plaintiff and could not operate as *res judicata* in the present suit. He urged that although it was open to Seth Mahadev Parshad to bring a suit for partition of the joint family property without impleading his son, the plaintiff, and although in case he had brought the suit without impleading the plaintiff the decree passed in the suit brought by him would have bound the plaintiff, he having in fact impleaded the plaintiff as a defendant, having gone to trial with him as one of the defendants and having got a consent preliminary decree with him as a party could not bind him by a final decree based on a compromise, to which he refused to become a party, after giving him up and after having his name struck off from the list of the defendants. There is considerable force in this contention of the learned

counsel. In all cases in which it has been held that the manager of a joint Hindu family effectively represents all the members of that family in any litigation respecting the joint family property, and that particularly in a suit for partition of the joint family property, the head of each unit of that family represents the whole unit consisting of himself and his descendants and not himself alone, the other members of the family sought to be bound by the decree have at no stage of the proceedings been brought before the Court as parties to the litigation. I am not aware of any case and none has been brought to our notice in which a person actually impleaded as a defendant in the suit may have been held to be bound by a decree based on a compromise to which he was not a party and which he expressly refused to accept. Such a case does not appear to me to fall within the purview of Explanation 6 at all. A compromise of a suit is nothing more than an agreement between the parties to such compromise, and a compromise decree does not stand on a footing higher than such an agreement with the order of the Court superadded to it. Such a decree cannot, therefore, bind any person who is not a party to the compromise unless of course it can be held that one of the parties to the compromise had the right or the authority to bind him by means of the same. No party can be said to have either the authority or the right to bind another party by an agreement to which such party has expressly refused to agree.

[6] While for the reasons indicated above I should have considerable hesitation in upholding the decision of the learned Subordinate Judge on the ground on which it is based I find that there is another difficulty in the plaintiff's way which to me appears to be wholly insuperable. After the partition decree of 1939 the plaintiff's father brought a suit against him, his son, his other brother and his mother for partition of the property which he had got as the result of the aforesaid partition. That suit, as has been pointed out above, was settled by means of a compromise, and the plaintiff accepted a certain share out of the property which his father had got at the aforesaid partition. Having got the benefit of the decree obtained by his father he is clearly now estopped from challenging the validity of that decree or otherwise seeking to go behind it. It is true that at the time of compromising with his father he made a reservation in favour of his right to seek such relief as he might under the law be entitled to in respect of the original partition to which he was not a party, and it is also true that he made a similar reservation when he appeared in Court when the compromise was sought to be recor-

ded. Any amount of reservations, however, on his part could not take away the legal effect of his having got the benefit of the original partition decree. The property that fell to the share of his father and, therefore, to the share of the joint family consisting of the said father and his sons including the plaintiff himself, having been divided with the consent of the plaintiff has become incapable of being thrown into the hotch-potch. For obvious reasons the plaintiff cannot get any relief which may have the effect of undoing the original partition unless it is possible to restore *status quo ante* and to throw the whole of the property which was the subject-matter of the original suit into the hotchpotch. The plaintiff having by his own conduct made this impossible cannot now be permitted to attack the original partition of which the fruits he has shared with his father.

[7] It was urged by the learned counsel for the appellant that the contesting defendants had resisted the suit only on a plea of *res judicata* and not on any plea of estoppel. I, however, am not impressed by this contention of the learned counsel. The plea of *res judicata* is only a plea of estoppel by judgment and if the defendant is unable to make out one species of estoppel but the circumstances disclosed on the record make out a case of another species of estoppel, I can see no reasonable ground for refusing relief to him. The question as to the legal effect of the compromise made by the plaintiff with his father in the partition suit brought by the latter is a pure question of law and I have no hesitation in holding that the mere absence of an express plea on the subject cannot debar the Court from giving effect to it.

[8] It was lastly contended by the learned counsel for the appellant that the plaintiff was in any case entitled to ask for an account of the income and expenditure of the business that had been expressly kept joint at the time of the partition of 1939 and for partition of the said business. He urged that the suit should not be thrown in its entirety but that the plaintiff should be allowed to amend his plaint by confining his claim only to an account and partition of the aforesaid business. As observed by the learned Subordinate Judge, I am of the opinion that if the plaintiff wants to claim any relief for account of partition of the business which was kept joint at the time of the partition he must seek his remedy by means of a fresh suit properly framed. The present suit being one to avoid the partition decree itself I do not think it would be either desirable or proper to allow it to be converted into a suit based on a recognition of the validity of that decree and for a relief flowing from and arising out of that decree.

[9] For the reasons given above, I see no force in this appeal and would dismiss the same. In the circumstances, however, I would make no order as to the costs of the appeal.

Khosla J. — I agree.

R.G.D.

Appeal dismissed.

A. I. R. (35) 1948 East Punjab 30 [C. N. 13.]

TEJA SINGH AND KHOSLA JJ.

Gainda Mal — Plaintiff — Appellant v. Madan Lal and others — Defendants — Respondents.

First Appeal No. 287 of 1945, Decided on 18-3-1948, from order of Sub-Judge 1st Class, Hoshiarpur, D/- 10-2-1945.

(a) Civil P. C. (1908), O. 23, R. 1 — Scope — Plaintiff can withdraw suit or part of claim at his sweet will — Leave of Court is necessary only in certain cases — Failure to obtain such leave precludes him from bringing fresh suit.

Under O. 23, R. 1 (1) if a plaintiff wishes to withdraw a suit or abandon a part of his claim he can do so at his sweet will. In certain cases it is necessary for him to obtain the permission of the Court under sub-rule (2), but according to the words of sub-rule (3) the only penalty to which he subjects himself for not obtaining the Court's permission under sub-rule (2) is that he shall be precluded from instituting any fresh suit in respect of the subject-matter or part of the claim about which he withdraws his suit or abandons his claim.

[Para 2]

Annotation:—('44-Com) Civil P. C., O. 23 R. 1 N. 2, N. 35 pt. 1.

(b) Interpretation of statutes — Duty of Court — Court should administer law as it stands — Fact that it causes loss of Government revenue is of no importance.

The Courts have only to administer the law as it stands and they have no concern whatsoever with the effect that this may have upon the fiscal policy of the Government. If a particular provision of law is so defective that if enforced it must cause loss in Government revenue, it is the business of the Legislature to amend it.

[Para 6]

Annotation:—('44-Com) Civil P. C., Pre. N. 7.

(c) Civil P. C. (1908), O. 23, R. 1 — Applicability — Rule applies to partition suits.

Order 23 R. 1 equally applies to suits relating to partition as it applies to money suits. The contention, that if a plaintiff in a partition suit is allowed to claim a share lesser than the one which he can claim, it will enable him to defraud the law relating to court-fees, is based upon misconception, because if a decree is passed in the plaintiff's favour he will get only that much property for which he has paid the court-fee and when the rest of the property is in the possession of the contesting defendants, the other defendants, even if they are colluding with the plaintiff, will not get their shares unless they pay court-fee on the respective values thereof.

[Para 6]

Annotation:—('44-Com) Civil P. C., O. 23 R. 1 N. 2.

(d) Civil P. C. (1908), O. 6, R. 17, O. 7, R. 11 and O. 23, R. 1 — Suit for partition — Plaintiff insufficiently stamped — Order requiring plaintiff to make up deficiency within certain time — Application by plaintiff for amendment of plaint by confining his claim to value on which he had already paid court-fees — Amendment held should be allowed.

A suit for partition of joint property, for rendition of accounts and for injunction was valued by the plaintiff

at a certain figure and a fixed court-fee with regard to the relief of partition was paid. The Court being of opinion that *ad valorem* court-fee on the value of the plaintiff's share was payable ordered the plaintiff to make up the deficiency in court-fee. The plaintiff then applied to sue in forma pauperis but the application was rejected and he was ordered to pay the deficient court-fee within a certain time. The plaintiff thereupon applied under S. 151 and O. 6 R. 17 praying for amendment of his plaint by reduction of his claim regarding possession by partition to one-four hundredth share in the property so as to bring the value for purposes of court-fee to Rs. 500, instead of Rs. 50,000. The Court disallowed the application and ordered the plaintiff to make up the deficiency within a fixed time and on failure of the plaintiff to make up the deficiency rejected the plaint under O. 7 R. 11:

Held that the plaintiff should have been allowed to amend his plaint as prayed for and the order rejecting the plaint under O. 7 R. 11 should be set aside. *Case law discussed.*

[Para 7]

Annotation:—('44-Com) Civil P. C., O. 6 R. 17 N. 13, O. 7 R. 11 N. 5 pt. 9 to 11; O. 23 R. 1 N. 10.

Cases referred:—

1. ('17) 44 Cal. 352 : 4 A. I. R. 1917 Cal. 77 : 40 I. C. 96, Midnapur Zemindary Co. v. Secy. of State.
2. ('41) I.L.R. (1941) 22 Lab. 451 : 28 A.I.R. 1941 Lab. 97 : 193 I. C. 641 (F. B.), Mt. Zebunnisa v. Din Mahomed.
3. ('31) 18 A. I. R. 1931 Mad 716 : 194 I. C. 816, Neelachalam v. Narasinga Dass.
4. ('37) 24 A. I. R. 1937 Cal. 562 : 172 I. C. 897, Saiyadunnessa Khatun v. Gaibandha Loan Co. Ltd.
5. ('39) 26 A. I. R. 1939 Bom. 354 : 185 I. C. 44, Narsidasji Balmakunddasji v. Bai Jamna.
6. ('46) 33 A. I. R. 1946 Mad 126 : 224 I. C. 280, Rama Krishna Reddy v. Veera Reddy.
7. ('27) 14 A. I. R. 1927 Lab. 543 : 103 I. C. 705, Karam Chand v. Jullundur Bank Ltd.

Shri Asa Ram — for Appellant.

Shri Dev Raj Sawhney and Shri Shamsher Bahadur — for Respondents.

Teja Singh J.— The facts giving rise to this first appeal shortly stated are as follows: On 2-8-1938, Gainda Mal instituted a suit against his brother and a number of collaterals for partition of the property that he claimed to be joint, for rendition of accounts and for permanent injunction. Though it was stated in the plaint that the value of the suit for purposes of jurisdiction was Rs. 13,550, (Rs. 20 for purposes of rendition of accounts, Rs. 5 for permanent injunction and Rs. 13,525 for purposes of partition), court-fee of Rs. 11/4 only was paid on the ground that the plaintiff fixed the value of the first two reliefs at Rs. 20 and Rs. 5 and a fixed fee of Rs. 10 was payable in respect of the relief of partition, because the suit property was in the joint possession of the plaintiff and the defendants. On the defendants' objection and on the plaintiff's own admission that the value of his one-fourth share to which he alleged to be entitled was Rs. 50,000. On 19-6-1939 the trial Court held that *ad valorem* court-fee for possession by partition had to be paid on that amount and ordered the plaintiff to make up the deficiency by 29th June. On 26th June the plaintiff applied for permission to sue

in *forma pauperis*, alleging that he was unable to pay the full court-fee required by the Court. The trial Court without going into the merits of the plaintiff's allegation that he was a pauper dismissed his application as well as the suit on 3-7-1939. On appeal to the High Court, Lahore, a Division Bench of that Court set aside the trial Court's order dismissing the plaintiff's application for permission to sue *in forma pauperis* as well as the decree by which he was non-suited and remanded the case with the direction that the application should be decided on merits, and if the Court came to the conclusion that the plaintiff was not a pauper, time should be granted to him to make up the deficiency in court-fee. After the remand the trial Sub-Judge found that the plaintiff had not been able to prove that he was a pauper. Accordingly he dismissed his application and ordered him to make up the court-fee within a month of the date of his order, that is, 15-8-1944. Against this order the plaintiff made a petition for revision to the High Court of Lahore. A learned Judge of that Court on 29-8-1944 stayed proceedings in the trial Court pending the hearing of the revision petition. The petition was ultimately dismissed by another learned Judge on 7-11-1944 and the trial Sub-Judge's order of 15-8-1944 was confirmed. On 8-11-1944, evidently before the records of the case could reach the trial Court, the plaintiff made an application to the trial Court under S. 151 and O. 6, R. 17, Civil P. C. detailing all these facts, alleging *inter alia* that he was unable to pay the full amount of court-fee ordered by the Court and stating that he reduced his claim re: possession by partition of the suit property from one-fourth to one-four hundredth share so as to bring the value for purposes of court-fee to Rs. 500 instead of Rs. 50,000. He further prayed that though it was not necessary in law to amend the plaint, in order to avoid all possible objections on the part of the other party he be allowed to make a necessary amendment in the plaint with regard to the value of the relief for partition. The application was opposed by the contesting defendants, firstly, on the technical ground that it had not been properly signed and attested and, secondly, that the Court having ordered the plaintiff to pay court-fee on Rs. 50,000 it was not open to the plaintiff to reduce his claim. The following issues were framed :

1. Whether the plaintiff can be allowed to amend the plaint so as to reduce his claim to Rs. 500, when he has not paid court fee as ordered by the Court ?
2. Whether for other reasons also the amendment should not be allowed ?
3. Whether it is necessary that the application should be signed and attested by the applicant ?

By his order dated 9-2-1945 the trial Sub-Judge found the third issue for the plaintiff but

decided the other two against him and ordered him to make up the deficiency in the court-fee by the 10th. Since the deficiency was not made up on the 10th the plaint was rejected under O. 7, R. 11, Civil P. C. This order is the subject-matter of appeal before us.

[2] The Court below while rejecting the plaintiff's prayer that he be allowed to reduce his claim took the view that after an order made under O. 7, R. 11 for the deficiency in court-fee to be made up, the plaintiff cannot be allowed to relinquish any part of his claim, and relied upon 44 Cal. 352.¹ The position taken up by the appellant's counsel is that according to O. 23, R. 1, Civil P. C., the plaintiff has an absolute right to abandon a part of his claim against all or any of the defendants, and as is laid down in sub-rule (1) of that rule he can exercise this right at any time after the institution of the suit and before the suit is finally disposed of. The counsel further urged that O. 7, R. 11 and O. 23, R. 1 should be read together. The relevant words of O. 7, R. 11 are :

11. "The plaint shall be rejected in the following cases:—

- (a) * * *
- (b) * * *

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so."

Order 23, Rule 1 reads as below :

"At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim."

Sub-rule (3) is to the effect that :

"where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-r. (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

It is, therefore, clear that if a plaintiff wishes to withdraw a suit or abandon a part of his claim he can do so at his sweet will. In certain cases it is necessary for him to obtain the permission of the Court under sub-r. (2), but according to the words of sub-r. (3) the only penalty to which he subjects himself for not obtaining the Court's permission under sub-r. (2) is that he shall be precluded from instituting any fresh suit in respect of the subject-matter or part of the claim about which he withdraws his suit or abandons his claim.

[3] To start with, the respondents' counsel took up the position that when a plaintiff has once fixed the value of his suit for purposes of jurisdiction he has no right whatsoever to reduce it at any stage of the suit, and when a suit is for possession of property court-fee must

be paid on the value so fixed. The learned counsel in order to support his contention referred us to 22 Lah. 451,² a Full Bench decision of the Lahore High Court. I have no hesitation in coming to the conclusion that that ruling has absolutely no application to the facts of the present case. In that case a Mohammadan had executed a family trust in respect of his property and had constituted himself to be the first *mutwalli*. The trust deed provided that after his death his son was to succeed him as *mutwalli*. The son after his father's death repudiated the trust and along with his brother effected several alienations of the dedicated property. The plaintiffs instituted the suit for a declaration that the property was *wakf* and that alienations thereof were null and void. They valued the relief at rupees ten lacs for the purposes of jurisdiction and paid court-fee of Rs. 10 under cl. (iii) of Art. 17 of Sch. II, Court-fees Act. The Full Bench held that the first part of the relief that the property was *wakf* was purely declaratory and did not involve any consequential relief and would, therefore, require Rs. 10 for the purposes of court-fee, and that as regards the second part of the relief that the alienations be declared null and void etc., it was tantamount to a substantive relief in the shape of the setting aside or cancellation of the alienations in question and could not be treated as purely declaratory or as a declaration with a consequential relief within the meaning of S. 7 (iv) (c) and required *ad valorem* court-fee on the value of the subject-matter of the sales, viz., rupees ten lacs as put in the plaint for the purposes of jurisdiction, for the reason that in a suit of that kind the value for the purposes of court-fee and jurisdiction was the same. There was no question of the plaintiff's right to withdraw a part of his claim and consequently there was no reference much less discussion of the provisions of O. 23, R. 1, Civil P. C. The counsel drew our attention to an observation made by Tek Chand J. in the course of his judgment that when a plaintiff fixed a certain value of the property, which is the subject-matter of the suit, for purposes of jurisdiction, it is not open to him to fix a different value thereof in respect of court-fee. These remarks should be read in the light of the facts of the case with which the learned Judge was dealing and do not imply that if the plaintiff wishes to relinquish a part of his claim he cannot be allowed to do so, because it would entitle him to pay less court-fee than he would have done if there had been no relinquishment. Where the plaintiff relinquishes a part of his claim the subject-matter of the suit would be confined to that part of the claim which is not relinquished and the value of the suit both for

purposes of jurisdiction and court-fee will be reduced accordingly.

[4] There is also a distinction between the facts of this case and those of 44 Cal. 352¹ upon which the trial Court has based its order. The plaintiff asked for a declaratory decree but the trial Judge held that consequential relief had also been claimed and consequently asked the plaintiff to supply the deficit court-fee within the time that he allowed for the purpose. The plaintiff failed in this and the plaint was rejected under O. 7, R. 11, Civil P. C. When the matter went up in appeal before the High Court, the plaintiff's counsel challenged the finding of the trial Court and contended that the suit fell within the purview of Art. 17, cl. (iii) of Sch. II, Court-fees Act and the court-fee of Rs. 10 was proper. The learned Judges of the High Court spurned this contention. After having held this the learned Judges further found that since the plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court, failed to do so, the trial Judge had no other alternative but to reject the plaint in accordance with the terms of O. 7, R. 11, Civil P. C. There is nothing to show that the plaintiff requested the trial Court to allow him to relinquish one of the reliefs claimed by him, before it recorded the order rejecting the plaint. A request of this kind was however made in the High Court, but was disallowed. In the present case the plaintiff relinquished a 399/400th part of his claim before his plaint had been rejected and when the suit was still pending, and in view of O. 23, R. 1 (i) he was perfectly right in doing so. This case has been considered and distinguished in a number of other cases and the consensus of opinion is in favour of the view that I have taken. Reference in this connection may be made to A. I. R. 1931 Mad. 716,³ A. I. R. 1937 Cal. 562⁴ and A. I. R. 1939 Bom. 354.⁵ It is not necessary to refer to the facts of all these cases. They were all discussed and followed by a learned Judge of the Madras High Court in A. I. R. 1946 Mad. 126.⁶ That was also a suit for partition. One of the items of property, that was the subject-matter of the suit, had been sold before the suit was instituted. The Sub-Judge held that before the plaintiff could claim partition the sale ought to be set aside and court-fee should be paid on the value of that item which was shown to be Rs. 1012 in the plaint. The Sub-Judge called upon the plaintiff to pay an additional court-fee of Rs. 119-15-0 till 23rd December 1943. The plaintiff took time for the payment till 30th December. On that day the Sub-Judge happened to be absent from Court and the case was postponed to 10th January 1944. On that day the plaintiff instead of paying the

deficit court-fee filed a memorandum giving up defendant 3, who was interested, and the item of the property which had been sold. The Subordinate Judge held that the plaintiff was not entitled to relinquish any portion of his claim without filing a petition for the amendment of the plaint and as no such petition had been filed he had no option but to reject the plaint. It was held by the High Court that under O. 23, R. 1, Civil P. C., a plaintiff has a right to relinquish part of his claim in order to bring it within the court-fee paid and that neither permission of the Court nor an application for amendment of the plaint is necessary for that purpose. It was further held that since before the expiry of the period fixed for payment of deficit court-fee the plaintiff filed a memo, stating that he gave up his claim to certain items of the properties the Court could not reject the plaint. As regards 44 Cal. 352¹ after giving the facts of the case and referring to the remarks of Sanderson C. J., appearing towards the end of his judgment this is what the learned Judge said :

"These observations no doubt seem to be in favour of the respondents, but the decision must be confined to the facts of the case which were that at the stage when the request was made to the High Court, the plaint had already been rejected."

[5] In A. I. R. 1927 Lah. 543⁷ the principle that it is open to a litigant to give up a part of his claim and to confine his relief to the rest was applied to an appeal and it was held that there was nothing to debar an appellant from relinquishing a part of his claim and paying court-fee stamp on the memorandum of appeal on the claim reduced on appeal.

[6] When faced with all these authorities and unable to say why the provisions of sub-rule 1, Rule 1 of Order 23 should not be given full effect to, the respondents' learned counsel contended that this "applies to money suits and not to suits relating to partition." He agreed that if a plaintiff came to Court with the allegation that on the facts stated in the plaint he was entitled to Rs. 5,000 as damages, but since he could not pay court-fee on the full amount he claimed Rs. 500 and paid court-fee only on that amount, there was nothing to debar him from doing so. But he urged that a suit for partition stood on a different footing from an ordinary money suit, inasmuch as each one of the defendants could get his share of the joint property on partition and if the plaintiff were allowed to relinquish his claim by reducing the share, to which he was in fact entitled this would result in loss to the Government revenue. In the first place, the Courts have only to administer the law as it stands and they have no concern whatsoever with the effect that this may have upon the fiscal policy of the Government. If a particular pro-

vision of law is so defective that if enforced it must cause loss in Government revenue, it is the business of the Legislature to amend it. Secondly, the contention, that if a plaintiff in a partition suit is allowed to claim a share lesser than the one which he can claim it will enable him to defraud the law relating to court-fee is based upon misconception, because if a decree is passed in the plaintiff's favour he will get only that much property for which he has paid the court-fee and when the rest of the property is in the possession of the contesting defendants, as it is in the present case, the other defendants, even if they are colluding with the plaintiff, will not get their shares unless they pay court-fee on the respective values thereof.

[7] For all these reasons I would allow the appeal, set aside the order of the trial Sub-Judge and remand the case with the direction that the plaintiff be allowed to amend his plaint by reducing his original claim and by confining his present claim to 1/400th share of the suit property on which he had paid the court-fee. The court-fee in appeal shall be refunded. The other costs shall abide the event.

[8] The parties' counsel have been directed to cause their respective clients to appear in the trial Court on 19-4-1948.

[9] **Khosla J.**—I agree.

K.S.

Appeal allowed.

[C. N. 14.]

A. I. R. (35) 1948 East Punjab 33

TEJA SINGH J.

Bansiram and others — Appellants v. Modan Singh—Respondent.

Second Appeal No. 1731 of 1945, Decided on 17-12-1947, from decree of Dist. Judge, Ferozpur, D/-30-4-1945.

(a) Punjab Relief of Indebtedness Act (7 (VII) of 1934), S. 13 (3)—Discharge of debts under, is automatic — No order is necessary — Mention of discharge of debts in order does not make it illegal.

Though the discharge of a debt is the automatic result of the statutory provisions of S. 13 (3) and no order of the Board is required declaring the debt to be discharged still the mere fact that a Board's order contains a note that the debt shall stand discharged does not make the whole order illegal, because the part of it that relates to discharge of the debt can be treated as redundant and ignored : 31 A.I.R. 1944 Lah. 127, *Ref.*

[Para 3]

(b) Punjab Relief of Indebtedness Act (7 (VII) of 1934), Ss. 13, 15 and 20—Board has inherent power to grant adjournment to effect amicable settlement.

Every Debt Conciliation Board has inherent power to adjourn the proceedings with a view, *inter alia*, to enable the creditor to decide for himself whether he should or should not accept the debtor's offer. The language of S. 13 (3), and S. 15 contemplates that the Board has such power. Section 20 of the Act which must be read with other provisions of the Act cannot therefore be construed in such a way as to take away the

Board's power of adjournments : 32 A. I. R. 1945 Lah. 223 (F.B.) *Disting.* [Para 3]

(c) Punjab Relief of Indebtedness Act (7 [VII] of 1934), S. 21—Civil Court has power to question only those orders of Board which are without jurisdiction.

The civil Courts cannot treat an order of the Board as illegal merely because it may not appear to it to be reasonable or proper. It can ignore and set aside only those orders of the Board which are without jurisdiction, i.e., which are in excess or in contravention of the powers conferred on it by the statute and are, therefore, *ultra vires*. [Para 5]

(d) Civil P. C. (1908), S. 100 — Finding of fact — Question whether there was a sufficient cause for non-appearance — Finding is binding in second appeal.

The question whether the decree-holder had a sufficient cause for not appearing before the Debt Conciliation Board on the date of hearing being one of fact a decision thereon cannot be disturbed in second appeal. [Para 6]

Annotation : ('44-Com.) C. P. C., S. 100 N. 39 N. 52 pt. 1.

Cases referred :—

1. ('44) 31 A. I. R. 1944 Lah. 127 : 216 I. C. 260, Mahomed Din v. Phula Singh.
2. ('45) 32 A.I.R. 1945 Lah. 223 : 221 I.C. 107 (F.B.), Kumar Uddin v. Kishen Das.
3. ('41) I.L.R. (1941) 22 Lah. 71=27 A.I.R. 1940 Lah. 401=191 I.C. 583 (F.B.), Lachman Singh v. Natha Ram. *Tek Chand* — for Appellants.
S. S. Jhanda Singh — for Respondent.

Judgment. — The facts giving rise to this second appeal may be shortly stated. Bansi Ram and others obtained a decree for Rs. 1,500 and costs against one Modan Singh. The amount was to be recovered by the sale of the mortgaged property. When the decree-holders started execution proceedings, Modan Singh made an application to the Debt Conciliation Board under S. 9, Punjab Relief of Indebtedness Act. After the decree-holders had appeared before the Board, Modan Singh offered to pay them Rs. 350 in full and final settlement of their claim. The decree-holders refused to accept the amount offered. On this, by their order of 3rd February 1944 the Board adjourned the case to 16th March 1944, in order to enable the decree-holders to consider over the matter. On 16th March the decree-holders failed to put in appearance. The Board then passed an order discharging their debt. In the meanwhile the decree-holders had applied to the executing Court on 10th February 1944 for the revival of the execution proceedings, which had been stayed in accordance with the Robkar of the Debt Conciliation Board, on the plea that the Board had authorized them to prosecute the execution application. The executing Court issued a notice to the judgment-debtor who when he appeared before the Court produced a copy of the Board's order discharging the decree-holders' debt. On 13th May 1944 the decree-holders made another application to the executing Court stating that the facts given in their previous application were

not correct and praying that the proceedings in the execution application should continue, because the order of the Board discharging the debt was without jurisdiction. The matter was put in issue but was found against the decree-holders. Their appeal having been dismissed by the learned District Judge, they have come to this Court.

[2] Two points were urged before me by the appellants' learned counsel : (1) that the Board had no jurisdiction to adjourn the case from 3rd February 1944 to 16th March 1944 and consequently their final order discharging the debt on account of the failure of the decree-holders to put in appearance on 16th March was illegal and (2) that even if the order of the Board dated 3rd February was not without jurisdiction, the decree-holders had sufficient cause for their failure to appear on the next day and there was no justification on the part of the Board to discharge their debt.

[3] As regards the first point, both the counsel are agreed that sub-s. (3) of S. 13, Punjab Relief of Indebtedness Act, under which the Board presumably passed the final order discharging the debt, does not contemplate an order to this effect in so many words. The relevant words of the sub-section are :

"If the creditor . . . fails without sufficient cause to be present . . . at any of the hearings fixed by the Board . . . the debt due to him . . . shall be deemed for all purposes and all occasions to have been fully discharged."

This means that if a creditor fails to appear before the Board on any of the dates fixed by it and the Board is of opinion that his failure to be present is without sufficient cause, it has simply to record these facts and the debt shall stand discharged automatically by process of law. Reference in this connection may be made to A. I. R. 1944 Lah. 127¹ where it was observed that the discharge of a debt is the automatic result of the statutory provisions of S. 13 (2) and (3) of the Act and no order of the Board is required declaring the debt to be discharged. I am, however, of the opinion that the mere fact that a Board's order contains a note that the debt shall stand discharged does not make the whole order illegal, because the part of it that relates to discharge of the debt can be treated as redundant and ignored. The real question, therefore, to be considered in connection with the first point is whether the Board was competent to adjourn the proceedings on 3rd February 1944 to 16th March 1944 and the creditors' failure to be present on the adjourned date can be visited by the penalty provided in sub-s. (3) of S. 13. The counsel argued that when a creditor appears before the Board and the debtor makes an offer, which the former refuses to accept, all that the

Board is required to do is to determine whether the debtor's offer is such that the creditor ought reasonably to accept and if it comes to the conclusion that it is, it has merely to grant the debtor a certificate in respect of the debt that he owes to the creditor and it has no jurisdiction whatever to adjourn the proceedings for any purpose. In support of his contention the counsel relied upon sub-s. (1) of S. 20 and the observations made by Abdul Rashid J. in A.I.R. 1945 Lah. 223.² The following are the words of S. 20 (1):

"Where during the hearing of any application made under S. 9, any creditor refuses to agree to an amicable settlement, the Board may, if it is of opinion that the debtor has made such creditor a fair offer which the creditor ought reasonably to accept, grant the debtor a certificate in such form as may be prescribed in respect of the debts owed by him to such creditor."

Now this section must be read with the other sections of the Act and in the light of the fact that the principal function of a Debt Conciliation Board is to bring about an amicable settlement between the debtor who applies under S. 9 and his creditors. Section 15 of the Act definitely lays down that the Board shall call upon the debtor and each creditor to explain his case regarding each debt, and shall use its best endeavours to induce them to arrive at an amicable settlement. If the endeavours to be made by the Board to bring about an amicable settlement between the debtor and his creditors are to be genuine and successful, the Board should have the right to adjourn the proceedings and to allow the parties time to think over the matter before making up their minds one way or the other. To say that as soon as an offer is made by a debtor and it is rejected by his creditor the Board must at once make up its mind whether it is going to pronounce it as fair, without allowing any time to itself to consider the matter or to the creditor to ponder over it, is to ignore the provisions of S. 15 altogether. My view, therefore, is that every Board has inherent power to adjourn the proceedings with a view, *inter alia*, to enable the creditor to decide for himself whether he should or should not accept the debtor's offer. A perusal of sub-ss. (3) and (4) of S. 13 would also go to show that the Legislature contemplated adjournments of the proceedings. The words of sub-s. (3) are:

"If the creditor fails without sufficient cause to be present in person or at any of the hearing fixed by the Board etc., the debt due to him or to the joint creditors, as the case may be, shall be deemed for all purposes and all occasions to have been fully discharged."

These words to my mind leave no doubt that the Board can fix any number of hearings before deciding the applications made to it.

[4] Before turning to the observations of Abdul Rashid J. in A. I. R. 1945 Lah. 223,² it

appears to be desirable to refer briefly to the facts of that case. An application was made by a debtor to a Debt Conciliation Board praying that conciliation might be brought about between him and his creditor. It was mentioned in the application that though the debtor had mortgaged his property to the creditor, the latter had been receiving the rents of the property in dispute and had also been living in a part of the property with the result that the entire debt had been wiped out and nothing remained due to the creditor on the basis of his mortgage-deeds. The prayers contained in the application were (1) that it might be declared that nothing was due from the applicant and (2) that in case the Board came to the conclusion that any sum was due from him to the creditor, it might be made payable by instalments. The application was made on 14th August 1939. The creditor appeared before the Board for the first time on 16th October. In spite of the fact that the debtor had not questioned the genuineness of the debt and had merely taken the plea that it had been paid off, the Board called upon the parties to produce their accounts together with attested copies and full particulars of the debt on 18th December 1939. The creditor produced the statement of debts and full particulars on that day. He also produced the mortgage deeds etc. The Board thought that the statements were not properly verified and accordingly returned them to the creditor with the direction that they should be put in after verification. This order was complied with on 23rd January 1940. The Board not being satisfied with this called for certain additional accounts. Thus the proceedings before the Board went on from one date to another. On 19th March the creditor presented an application that no reconciliation was possible as the debtor was deliberately prolonging the proceedings and he prayed that they be terminated in accordance with the provisions of S. 20 of the Act. On 25-4-1940, the Board made a note that the parties were present and that the creditor had put in accounts but the accounts of the debtor had yet to be gone through. The case was, therefore, adjourned to 27th April for that purpose. On further hearings the Board took evidence and finally on 22nd November discharged the debt under S. 13 (3), Punjab Relief of Indebtedness Act, on the ground that though the creditor possessed certain bahis, he had deliberately refused to produce them. The Full Bench held that the order of the Board was without jurisdiction, and the following were the observations made by Abdul Rashid J. who wrote the judgment of the Bench:

"When the creditor refuses to agree to any amicable settlement the only course open to the Board is to con-

sider whether the debtor had made a fair offer which the creditor ought reasonably to accept, and if this is so a certificate should be granted to the debtor in respect of the debt owed by him to the creditor After the refusal of the creditor to agree to any conclusion the Board has no right to continue the proceedings and, therefore, an order passed thereafter discharging the debt under S. 13 (3) for failure of the creditor to produce certain *bahis* is *ultra vires* and without jurisdiction."

[5] It will thus be seen that the facts of the Lahore case are entirely different from those of the present one and the reasons for which the order of the Board was held to be without jurisdiction do not apply here. There the Board had not merely granted adjournment after adjournment but had also called upon the creditor to produce the additional account books which it had no power to do in the circumstances of the case, because the debtor had admitted that the debt in question was at one time due and the only plea taken by him was that it had been wiped out because of the reasons mentioned in his application. In the present case, the Board simply adjourned the proceedings to another date and the object of the adjournment as is definitely stated in the order, was to allow the creditors an opportunity to consider whether they would accept the debtor's offer. Then it is clear from the last sentence of the quotation from the judgment of Abdul Rashid J., which I have given above, that what the learned Judge held was that the order of the Board discharging the debt for the failure of the creditor to produce *bahis* etc., after he had refused to accept the debtor's offer was without jurisdiction. The appellant's counsel emphasised the words "the Board has no right to continue the proceedings." In my view, they do not mean that the Board has no right to adjourn the proceedings for a single date even if the object be to afford time to the creditor to consider the offer made by the debtor and to decide whether he should accept it or not. When the learned Judge used the words "continue the proceedings," he was naturally thinking of the facts of the case which he had before him and was not laying down a general proposition. Accordingly, I hold that the order of the Board adjourning the proceedings to 16th March 1944, was not without jurisdiction. It was also urged by the appellant's counsel in connection with his first point that assuming that the Board could grant adjournments in the proceedings pending before it, the adjournment in question amounted to a misuse of the discretion vested in it by law, inasmuch as the offer made by the debtor was so ridiculous that the decree-holders could not be expected to accept it under any circumstances. I have no hesitation in repelling this contention as utterly unsound for the simple reason that the civil Courts cannot treat an

order of the Board as illegal merely because it may not appear to it to be reasonable or proper. It can ignore and set aside only those orders of the Board which are without jurisdiction i. e., which are in excess or in contravention of the powers conferred on it by the statute and are, therefore, *ultra vires*. In this respect, I cannot do better than to quote the following passage from the judgment of the Lahore case which the appellant's counsel himself relied upon:

"Reliance was placed in this connexion, on the Full Bench decision in 22 Lah. 71³ where it was held that the Debt Conciliation Board is a tribunal of special jurisdiction and its powers are limited by the statute under which it was created. Such tribunal must act within its powers and so long as it does so, its orders—whether right or wrong—cannot be challenged except in the manner, and to the extent, prescribed by the statute and the Courts of ordinary jurisdiction cannot question them. But where its actions are in excess, or in contravention of the powers conferred on it, they are *ultra vires* and of no legal effect."

The first objection of the appellants' counsel is, therefore, overruled.

[6] As regards the second point, the question whether the decree-holders had a sufficient cause for not appearing before the Board on 16-3-1944, is concluded by the finding of the learned District Judge, which is one of fact and cannot be disturbed in second appeal. Besides this, my opinion is that the finding is perfectly sound. The position taken up by the decree-holders in their application of 10-2-1944 was that they had been authorised by the Board to proceed with their execution application. The Board's order of 3-2-1944, gives a direct lie to this contention and evidently it was for this reason that the decree-holders themselves gave it up later on and took their stand upon the plea that the Board's order was without jurisdiction. The second objection also fails and is decided against the appellants.

[7] The result is that the appeal must stand dismissed with costs.

[8] I declare that this is a fit case for a Letters Patent Appeal.

K.S.

Appeal dismissed.

A. I. R. (35) 1948 East Punjab 36 [C. N. 15.]

TEJA SINGH J.

Lukshmi Shud Khadi Bhandar, Doaba — Plaintiff—Appellant v. Bhagat Singh and others — Defendants—Respondents.

Second Appeal No. 1504 of 1945, Decided on 5-11-1947, from decree of Addl. Dist. Judge, Jullundur at Hoshiarpur, D/- 19-5-1945.

Limitation Act (1908), S. 19 — Statement of account — Acknowledgment should be of subsisting liability—Letter by defendant stating that plaintiff owed something to defendant — Statement of account also accompanying letter — It is not acknowledgment of defendant's liability.

In order that an acknowledgment may fall within the purview of S. 19 and give a fresh start to a period of limitation, the acknowledgment should be of a subsisting liability. [Para 2]

Where the words of the letter by defendant to the plaintiff not only did not imply any admission of the defendant's liability to the plaintiff, but on the other hand it was stated therein that the plaintiff owed something to the defendant and the statement of the account was enclosed with the letter in order to clarify the whole position:

Held, that the letter together with the statement of account did not imply an acknowledgment of open and unsettled account by the defendant within the meaning of S. 19 though the letter contained a request to the plaintiff to join with the defendant in referring the matter to arbitration for the settlement of the dispute, the dispute being with regard to the exact amount due by the plaintiff to the defendant and not by the defendant to the plaintiff: 26 A. I. R. 1939 Lah. 216, *Disting.* [Para 3]

Held further that statement of account in so far as it referred to the amount payable by the defendant to the plaintiff, merely showed that some amount was due by the defendant to the plaintiff at one time, and accordingly if it involved the acknowledgment of any liability it was of past liability and as such it could not be taken any advantage of under S. 19: 26 A. I. R. 1939 Lah. 216 and 33 Cal. 1047 (P.C.), *Disting.*: 8 A.I.R. 1921 All 335, *Commented and Disting.*; 60 P.R. 1887; 2 A.I.R. 1915 Lah. 375 and 14 A. I. R. 1927 All. 317, *Rel. on.*

Annotation :— ('42-Com) Lim. Act, S. 19 N. 20 and 25.

Cases referred :—

1. ('39) 26 A. I. R. 1939 Lah. 216, *Mt. Diwanni Widya-wati v. Ramji Das & Co.*
2. ('21) 43 All. 216 : 8 A. I. R. 1921 All. 335 : 59 I. C. 941, *Curlender v. Abdul Hamid.*
3. ('06) 33 Cal. 1047 : 2 N. L. R. 130 : 33 I. A. 165 (P. C.), *Mani Ram v. Rup Chand.*
4. ('87) 60 P. R. 1887, *Murree Brewery Co. v. Hazura Mal.*
5. ('16) 41 P. R. 1916 : 2 A. I. R. 1915 Lah. 375 : 31 I. C. 693, *Miran Bakhsh v. Mt. Mehr Bibi.*
6. ('27) 14 A. I. R. 1927 All. 317 : 100 I. C. 189, *Jugal Kishore v. T. Caul.*

D. N. Aggarwal — for Appellant.

Som Datta Bahri — for Respondents.

Judgment. — The only question involved in this second appeal is whether the suit was within time because of an alleged acknowledgment of liability made by the defendant.

[2] It is not denied that in order that an acknowledgment may fall within the purview of S. 19, Limitation Act, and give a fresh start to the period of limitation the acknowledgment should be of a subsisting liability. The acknowledgment upon which the plaintiff relied in the present case is said to be contained in Ex. P-1, a letter written by the defendant to the plaintiff on 4th April 1940 and a statement of an account attached thereto. The letter itself does not contain any admission of liability. On the other hand, it is mentioned therein that it is the plaintiff that owes something to the defendant. After referring to a previous letter that the defendant sent to the plaintiff, by which he

was asked to appoint an arbitrator to settle his account, it went on to say that the plaintiff should nominate his arbitrator on the receipt of the letter so that the defendant might also nominate his arbitrator and take necessary steps to have the question referred to arbitration. The concluding part of the letter contained a warning to the plaintiff that in case he failed to accede to the defendant's wishes, the latter would be forced to take the matter to Court. The heading of the account which the defendant sent to the plaintiff with the letter mentioned above (Ex. P-6) was "Statement of account showing the amounts payable by you to us." It consisted of several items which, according to the statement, the plaintiff owed to the defendant and those due by the defendant to the plaintiff. The total of the first set of items came to Rs. 736/2/3. and that of the second set to Rs. 574/1/3, leaving a balance of Rs. 162/1/- due by the plaintiff to the defendant.

[3] The counsel for the plaintiff-appellant urged that though the letter itself did not contain in so many words any acknowledgement of liability, taken along with the statement of accounts that accompanied it, it implied an "acknowledgment of an open and unsettled account" and as such it was sufficient to attract the application of S. 19. I have no hesitation in holding that the contention is wholly devoid of force. As I have already observed, the words of the letter not only do not imply any admission of the defendant's liability to the plaintiff, but on the other hand it is stated therein that the plaintiff owes something to the defendant and the statement of the account was enclosed with the letter in order to clarify the whole position. It is correct that the letter contained a request to the plaintiff to join with the defendant in referring the matter to arbitration for the settlement of the dispute, but the dispute, according to the contents of the letter, was with regard to the exact amount due by the plaintiff to the defendant and not by the defendant to the plaintiff. It is, therefore, entirely wrong to say that the letter either by itself or read along with the statement of account that accompanied it contained admission of an open account.

[4] Counsel relied upon A. I. R. 1939 Lah. 216,¹ 43 ALL. 216² and 33 Cal. 1047.³ The facts of the Lahore case were quite different. A dispute arose between the plaintiff and her agent who was managing a bungalow on her behalf. The duties of the agent included the letting out of the bungalow on rent and carrying out of repairs. The plaintiff wrote to her agent calling upon him to remit to her a certain amount which she claimed was due from him. The defendant wrote to her

in reply that according to the accounts kept by him the amount due by him to her was only Rs. 110-6-11, which was much less than the amount mentioned in the plaintiff's letter. The learned Judge of the Lahore High Court held that the defendant's letter amounted to an acknowledgment of liability since it contained an admission of the existence of an unsettled outstanding account between him and the plaintiff. This ruling has no application whatever to the present case. In the Allahabad case the plaintiff claimed that the period of limitation for the suit started afresh from a letter sent by the defendant to him with which he also enclosed a memorandum of account. The memorandum of account showed that the amount of Rs. 1654 was as a matter of fact due to the plaintiff on a particular date, but the defendant squared the account on that date by debiting the plaintiff's account with the sum of Rs. 1497-7-6 due to the defendant from the plaintiff and remitted the balance of Rs. 156-8-6 to the defendant. The learned Judges, without giving any reason in support of the conclusion reached by them, held that the memorandum of account was an acknowledgment of right within the meaning of S. 19, Limitation Act and then went on to discuss whether the suit was within limitation, because of part payments of the principal sum from the defendant to the plaintiff within the meaning of S. 20, Limitation Act. This fact was also found in favour of the plaintiff. From a perusal of the judgment I am not in a position to say what considerations weighed with the learned Judges for holding that the entries in the memorandum of account amounted to an acknowledgment of liability and whether there were certain words in the letter with which the statement of account was enclosed that were also taken into account. Apart from this it appears to me that the statement of account could be construed as containing an acknowledgment of a subsisting liability and it was with a view to meet that liability in part that the defendant had debited the amount of Rs. 1497-7-6 to the plaintiff. The statement of account in the present case, in so far as it referred to the amount payable by the defendant to the plaintiff, merely showed that some amount was due by the defendant to the plaintiff at one time, and accordingly if it involved the acknowledgment of any liability it was of past liability and as such it could not be taken any advantage of under S. 19. As regards the Privy Council case, the acknowledgment that their Lordships held to fall within the meaning of S. 19, Limitation Act consisted of an admission by the defendants that a sum of money had been received by them and that there were open and current accounts between the parties.

[5] In my view the cases that are applicable

here are 60 P. R. 1887,⁴ 41 P. R. 1916⁵ and A. I. R. 1927 ALL. 317.⁶ In the first case the following letter had been written by the defendant to the plaintiff :

"I find the account against you amounting to Rs. 1743 and the credits you are entitled to are Rs. 503, leaving a balance due to the company (defendants) of Rs. 1239. I enclose details of each side of the account, and must request a very early settlement of the same."

It was held that the letter was not an acknowledgment of any amount due by the defendants to the plaintiff. In the second case the plaintiff took his stand upon a written statement that the defendant had filed in a previous case wherein he had admitted that he had once taken Rs. 1,000 from the plaintiff as an earnest money but added that the amount had been more than repaid by delivery of cotton to the value of Rs. 3,000. It was held that the written statement did not amount to an acknowledgment of liability in respect of Rs. 1,000. After observing that they found it difficult to understand how a statement of that kind could be construed into an admission of then existing liability in respect of Rs. 1,000 and distinguishing 33 Cal. 1047⁸ this is what Rattigan J. said :

"In the present case there is no admission that open and current accounts were in existence between the plaintiffs and the defendants at the time when the written statement was filed, nor is there any admission from which a liability to pay the sum of Rs. 1,000 can be implied."

[6] In the third case the letter sent by the defendant to the plaintiff contained the following words :

"I do not understand why you persist in sending me bills when you yourself owe me Rs. 528. Please deduct your bill from the money you owe me and send the balance of Rs. 181-8 at your earliest. It will oblige. Don't sent any more bills please."

[7] The learned Judge repelling the plaintiff's contention that the letter contained an acknowledgment of liability observed that instead of containing any acknowledgment, the letter expressly denied any liability.

[8] Relying upon these authorities I hold that the lower appellate Court was right in finding that the plaintiff's suit was barred by time and dismiss the appeal with costs.

R.G.D.

Appeal dismissed.

A. I. R. (36) 1948 East Punjab 38 [C. N. 16.]

TEJA SINGH J.

In the matter of Lakshmi Commercial Bank Ltd., Ludhiana.

Civil Original Case No. 5-E of 1947, Decided on 19-3-1948.

Companies Act (1913), S. 153 (2) — Sanction of scheme — Power and duties of Court — Scheme approved in meeting of members and creditors — Sanction of Court to such scheme is not formal matter—Court must consider scheme on merits.

Even if the scheme is passed in the meetings of creditors or members by the requisite majority it can bind all the persons concerned, including the creditors and members, only if it is sanctioned by the Court. The words of the section leave no doubt that the sanction of the Court is not a formal matter. On the other hand, it appears to be the duty of the Court to go into the whole matter carefully and to find out (i) whether all the provisions of law and the directions of the Court itself in so far as they relate to the holding of the meeting, the conduct of the proceedings of the meeting and the record of majority votes etc. have been fully complied with, and (ii) whether the scheme is in the interest of the company as well as in that of its creditors and should be given effect to : (1891) 1 Ch. 213 and (1893) 3 Ch. 385, *Ref.* [Para 2]

Where the Court is satisfied that the meetings were properly held and all the directions given by the Court and all the relevant provisions of the law pertaining to the holding of the meetings etc. were complied with, the Court is not justified in going into the reasons which led the creditors, who were present in the meeting, to agree under the scheme to give up a part of their debts : (1893) 3 Ch. 385, *Ref.* [Para 3]

Annotation : — ('46-Man.) Companies Act, S. 153 N. 14.

Cases referred : —

1. (1891) 1 Ch. 213 : 60 L. J. Ch. 221 : 64 L. T. 127, *In re Alabama, New Orleans and Co. Ry.*
2. (1893) 3 Ch. 385 : 62 L. J. Ch. 825 : 69 L. T. 268 : 42 W. R. 4, *In re English, Scottish and Australian Chartered Bank.*

Veda Vyasa, Bal Raj Tuli, Mehtab Singh, L. Sewa Ram Kapur, Managing Director and S. Joginder Singh, Secretary — for Petitioner.

Mangal Singh in person with Hans Raj Sachdeva — for Objector.

Order. — An application under ss. 153 and 153-A, Companies Act, was made to this Court by the Lakshmi Commercial Bank Limited, Ludhiana, a company incorporated under the Companies Act, praying that meetings of the depositors and members of the Bank be called, held and conducted, in such manner as the Court directed to consider a scheme of arrangement prepared by the directors of the company. Being satisfied that there were good reasons for accepting the prayer of the Bank, I ordered that the meeting of the directors and the members of the Bank be held at Delhi on 25-1-1948 and the wishes of the depositors and the members of the Bank be ascertained in respect of the scheme put forward by the management. The reports of the respective chairmen who presided over the meetings were that the scheme in question with slight modifications was adopted in the meeting of the depositors by overwhelming majority and in that of the members unanimously. When the case came up before me on 25th February for consideration of the scheme, only two of the depositors, namely Lakshmi Insurance Company and Mangal Singh objected to it. The counsel for the Lakshmi Insurance Company, whose objections were not in fact against the scheme but related to other

matters, did not put in appearance on the subsequent dates. Mangal Singh has withdrawn his objections today and states that he would be perfectly satisfied, if the questions relating to the priority of his claim and the set off, to which he says he is entitled, are decided by the Court after the scheme has been approved. The counsel of the petitioner Bank has no objection to the procedure suggested by Mangal Singh. So the result is that the scheme as was finally adopted in both the meetings mentioned above may now be taken as acceptable to everybody concerned.

[2] This however does not absolve the Court from considering the scheme on merits and deciding whether it should be given effect to. The words of sub-s. (2) of S. 153 are that

"if a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members"

From this, it is clear that even if the scheme is passed in the meetings of creditors or members by the requisite majority, it can bind all the persons concerned, including the creditors and members, only if it is sanctioned by the Court. The words of the section leave no doubt that the sanction of the Court is not a formal matter. On the other hand, it appears to be the duty of the Court to go into the whole matter carefully and to find out (i) whether all the provisions of law and the directions of the Court itself in so far as they relate to the holding of the meeting, the conduct of the proceedings of the meeting and the record of majority votes etc. have been fully complied with; and (ii) whether the scheme is in the interest of the company as well as in that of its creditors and should be given effect to. Reference in this connection may be made to the following observations made by Lindley L. J. in (1891) 1 Ch. 213.¹

"What the Court has to do is to see, first of all, that the provisions of the statute have been complied with; and, secondly, that the majority has been acting *bona fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly take a view which can be reasonably taken by business men."

Later on the learned Judge observed :

"The Court must look at the scheme, and see whether the Act has been complied with, and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it."

In another case, (1893) 3 Cl. 385,² the same learned Judge held that the Court did not simply register the resolution come to by the creditors or the shareholders as the case may be.

[3] The scheme in the present case has been formulated with the object of resuscitating the Bank, which appears to have suffered very heavily because of the abnormal conditions created by the division of the Punjab into two parts. One of the provisions of the scheme is that a certain percentage of the debts due to the depositors and other creditors should be written off and in lieu thereof the creditors be allotted shares in the Bank. The second important provision is that the present management of the Bank should be maintained. As regards the first, since I am satisfied that both the meetings were properly held and all the directions given by me and all the relevant provisions of the law pertaining to the holding of the meetings etc. were complied with, I do not think I am justified in going into the reasons which led the creditors, who were present in the meeting, to agree to give up a part of their debts. I am strengthened in this view by the remarks made by Lindley J. in the second of the two cases cited above. The learned Judge said :

"While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, i. e., with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage."

[4] As regards the main object underlying the scheme, i. e., the resuscitation of the Bank, I have my grave doubts whether this can be achieved. The money market has received a rude shock because of the unprecedented devastation that we have witnessed recently and the credit of a large majority of banking institutions has been injured. This must be particularly so in respect of the petitioner Bank and the other Banks who had to approach the Government for protection. In the circumstances, it is doubtful whether the petitioner Bank will be able to attract new business and a large number of people will be coming forth to entrust it with fresh deposits. At the same time, I cannot help observing that the directors of the Bank appear to me to be really serious in keeping the Bank alive and I am inclined to believe the assurance given by their counsel that they mean to make genuine efforts in this direction. On careful consideration of the detailed statements which the Secretary of the Bank made before me and

the balance-sheet and other papers that have been placed on record under my orders the impression that I have formed of the directors is that they were very scrupulous in managing the affairs of the Bank at a very critical time. One thing, which struck me as very significant, is that though the directors were aware that the Bank was facing a real crisis and there was the danger of the value of the assets of the Bank going down considerably, the majority of them allowed bulk of their deposits with the Bank to remain intact. I examined the Secretary regarding the expenses that the Bank has incurred ever since it stopped business and I think that they are rather heavy. I even do not approve of the large sum of money that the Bank is alleged to have spent for legal charges and I am of opinion that either the management was careless in the matter or it was prevailed upon to spend heavily in order to get out of a situation which they regarded or were made to regard serious. In view, however, of the fact that I have been assured that the future expenses are going to be considerably reduced and the past conduct of the directors, I hold that the interest of the Bank as well as of the creditors require that the present management should be maintained. Moreover, the petitioner's counsel have agreed to abide by the conditions which I am going to lay down for the acceptance of the scheme and which will enable a representative of the creditors to take active part in, and the Court to keep a strict watch over the future working of the Bank.

[5] The result is that the scheme is accepted subject to the following conditions: (1) that in para 9 of the scheme the words "the High Court of the East Punjab" will be substituted for the words "competent Court"; (2) that in the note appended to the scheme the following words shall be added at the end "by the High Court of the East Punjab;" (3) that the petitioner Bank will submit to this Court after every three months a report regarding the progress made (a) in the collection of the assets; (b) the amount of new business; and (c) the expenses incurred by the Bank over and above the usual expenses on the establishment; and (d) the total amount disbursed amongst the creditors during the period under report; (4) that a copy of the balance-sheet when ready and adopted by the members of the Company be submitted to this Court; (5) that the Auditors of the Bank be appointed with the approval of the Court, (6) that the present directors will co-opt with the approval of this Court one of the creditors as a co-director with them and the said director will in addition to his ordinary duties supervise over the day to day working of the Bank.

[6] The directors will submit their nomination to this Court within a month and the question relating to the remuneration of the co-opted director will be decided then.

[7] As regards Mangal Singh's claim for priority and adjustment the Bank will put in their written report within a month when a date of hearing will be fixed and the parties will be informed of it.

V.B.B.

Order accordingly.

A. I. R. (35) 1948 East Punjab 41 [C. N. 17.]

TEJA SINGH AND KHOSLA JJ.

Thakardwara Naushehra under the management of Mahant Makhan Das — Defendant — Appellant v. Om Prakash, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 933 of 1945, Decided on 19-2-1948, from decree of Dist. Judge, Hoshiarpur, D/-20-12-1944.

(a) Hindu law — Religious Endowment — Presumption — Succession to property from guru to chela for last 100 years — Incumbents, bairagis — No evidence to show that any of them had natural heirs and that there was conflict between them and chelas—No presumption arose that property belonged to institution.

From the mere fact that for a period of about one hundred years the property had been descending from guru to chela no presumption could be raised that it belonged to the institution of which the last incumbent was in charge as a mahant having no personal interest in it, when all the previous incumbents were bairagis and there was nothing to show that any of them had natural heirs and that there was any conflict between the latter and the chelas : 29 A. I. R. 1942 Bom. 291, *Rel. on*; 22 P. R. 1896 (FB) and 2 P. R. 1907 (Rev.) *Disting.* [Para 5]

(b) Hindu law — Religious Endowment — Presumption—After death of mahant, property divided between two chelas — Inference is that property did not belong to institution.

The very idea of a chela succeeding the Mahant is that he represents the institution; but when the property is divided between two chelas and each of them succeeds to half the share, the inference is that the property did not belong to the institution. [Para 5]

(c) Punjab Tenancy Act (16 [XVI] of 1887), S. 59 (1) (d), proviso — Collateral succession—That the holding was occupied by common ancestor must be shown.

The case of a collateral desiring to succeed to an occupancy holding falls within the purview of cl. (d) of sub s. (1) of S. 59 and according to the proviso to that clause it is incumbent upon him to prove that the land was occupied by common ancestor. [Para 6]

(d) Civil P. C. (1908), O. 6, R. 2 — Case falling under S. 59 (1) (d), Punjab Tenancy Act—Claimant must plead and prove that land was occupied by common ancestor—Punjab Tenancy Act (16 [XVI] of 1887), S. 59 (1) (d).

When a person is not the lineal descendant of the deceased occupancy tenant in the male line and claims the right of succession under S. 59 (1) (d), Punjab Tenancy Act, on the ground that he is his male collateral relative in the male line of descent from the com-

mon ancestor of the deceased tenant and himself, it is for him first to allege and then to prove that the common ancestor occupied the land. Where the plaintiff makes no such allegation in his plaint, he cannot afterwards be allowed to prove that the land was occupied by the common ancestor. [Para 6]

Annotation : ('44-Com.) Civil P. C., O. 6 R. 2, N. 9.

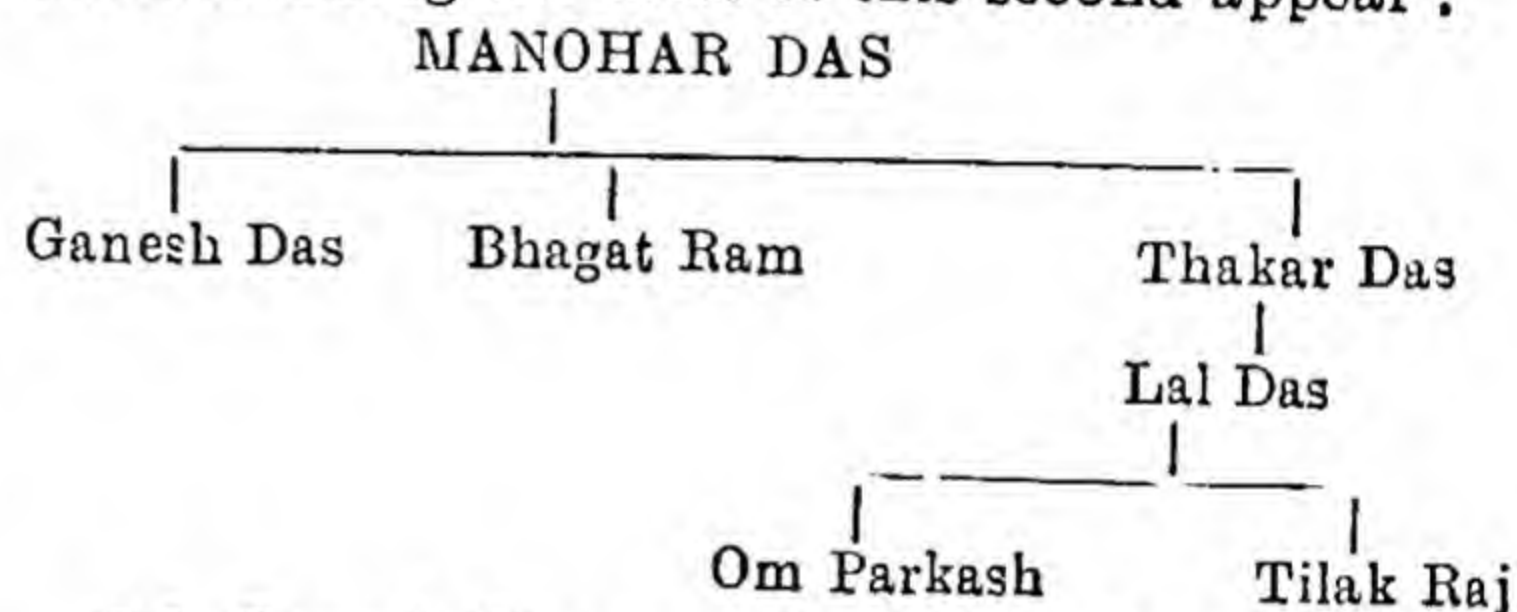
Cases referred :—

1. ('96) 22 P. R. 1896 (F.B.), Punjab Singh v. Sant Ram.
2. ('07) 2 P. R. 1907 Rev., Sher Singh v. Saya Rama.
3. ('42) 29 A. I. R. 1942 Bom. 291 : 204 I. C. 275, Amardas Mangal Das v. Hamambhai Jethabhai.
4. ('20) 1 Lah. 540 : 8 A.I.R. 1921 Lah. 337 : 59 I. C. 734, Indar Singh v. Fateh Singh.
5. ('38) 40 Bom. L. R. 1041 : 25 A. I. R. 1938 Bom. 471 : 178 I. C. 926, Dhoribhai Dadabhai v. Pragdasji Bhagwandasji.

Balmokand — for Appellant.

Asa Ram Aggarwal — for Respondents.

Teja Singh J.—The following pedigree-table, which appears to have been proved by the parties' statements and evidence, will be helpful in understanding the facts of this second appeal :



[2] Ganesh Das was the owner of 129 *kanals* and 5 *marlas* of land and he held occupancy rights in 65 *kanals* 9½ *marlas*. He died childless in April 1941 and the entire land left by him, including his occupancy holding, was mutated by the revenue authorities in favour of Thakardwara Naushehra on the ground that it belonged to the institution. Om Parkash who was minor at the time, through his next friend and grandfather Thakar Das, brought a suit for possession of the land. He alleged that the suit land was the personal property of Ganesh Das and consequently he being Ganesh Das's grandson and heir was entitled to it. He claimed that he was the *chela* of Ganesh Das and had a right to inherit the suit land in that capacity also. It was further alleged in the plaint that Bhagat Ram and Thakar Das had relinquished their rights in the plaintiff's favour. The suit was resisted by the Thakardwara on the plea that Ganesh Das held the land as a representative of the Thakardwara and the land in fact belonged to the Thakardwara which was a religious institution. The plaintiff's allegation in respect of his being Ganesh Das's *chela* and the relinquishment of their respective rights by Bhagat Ram and Thakar Das, if any, were also denied. The following issues were framed by the trial Court :

1. Is the suit maintainable in its present form?
2. Cannot the suit lie without the consent of the Advocate-General?

3. Was the suit land *waqf* property and did it vest in the Thakardwara at Mauza Naushehra as such?

4. Was the suit land the private and personal property of Ganesh Das?

5. Was the plaintiff a *chela* of Ganesh Das and as such entitled to possess the land in dispute?

6. Is the plaintiff entitled to possess the land as grandson and heir of Ganesh Das?

The technical issues were found for the plaintiff. As regards the issues on merits, the trial Sub-Judge held that though the plaintiff had not been proved to be Ganesh Das's Chela, he was entitled to inherit the suit land, because it was Ganesh Das's personal property and the plaintiff was his grandson. In the result the plaintiff's suit was decreed with costs. On appeal the learned District Judge did not accept the finding of the trial Sub-Judge regarding the relationship of the plaintiff with Ganesh Das and held that he was not Ganesh Das's grandson but the grandson of his brother Thakar Das; none the less he upheld the decree in his favour, because he agreed with the trial Sub-Judge that the suit land was not *waqf* property and the other heirs of Ganesh Das having relinquished their rights in the plaintiff's favour he had a right to succeed to it. The Thakardwara has now come to this Court on second appeal.

[3] The first point urged by the appellant's counsel was that the finding of the Courts below that the suit property was Ganesh Das's personal property is not supported by evidence and is erroneous. He further argued that since for a period of about one hundred years the property has been descending from Guru to Chela no presumption ought to have been raised that it belonged to the institution of which Ganesh Das was in charge as a Mahant and Ganesh Das had no personal interest in it. So far as the occupancy rights are concerned, counsel drew our attention to 22 P. R. 1896¹ and 2 P. R. 1907 (Rev.)² in order to show that in respect of occupancy rights which are not attached to an institution and are entered in the name of the Mahant, a Chela has no right of succession under S. 59, Punjab Tenancy Act, but when the property is attached to the institution, succession is from Guru to Chela. The relevant words of S. 59 are "male lineal descendant in the male line of descent" and the question referred to the Full Bench in 22 P. R. 1896¹ was whether a Chela of a deceased Bairagi Faqir could succeed to the occupancy rights of the deceased against the wishes of the proprietors. The Full Bench held that the Chela was not a "male lineal descendant in the male line of descent" within the meaning of the section. Learned counsel drew our attention particularly to the following passage appearing in the judgment of Rivaz J. :

"It should be observed that we have no question before us in the present case of the descent of an occu-

pancy holding granted to, or attached to a religious institution, as such, the incumbent of which for the time being is merely manager and occupant of the land on behalf of the institution. Admittedly the occupancy holding in the present case belonged to the deceased Bairagi personally, and not to any institution (if such there be) of which he was merely the manager."

[4] The second case relied upon by the counsel was decided by the Financial Commissioner, Punjab, and he held that where occupancy rights belong to a religious institution, the Chela of the last incumbent who has become Mahant of the institution is entitled to succeed to them in his representative capacity as head of such institution.

[5] I have nothing to say regarding the correctness of the above mentioned rulings, but what I do not accept is that it logically follows therefrom that when there is a long line of succession of occupancy holding from Guru to Chela, this fact by itself should give rise to a presumption that the holding belonged to the institution. I am inclined to think that something further has to be shown and among others it should be established that the Gurus were not complete ascetics, that they had natural heirs who could succeed to the holding by virtue of S. 59 and that there was actually a competition between those heirs and the Chelas or there could have been such competition between them on the question of succession. I am supported in this view by the observations made by Broomfield J. in A. I. R. 1942 Bom. 291.³ This is what the learned Judge said :

"As for the presumption which in 1 Lah. 540⁴ and other cases cited in 40 Bom. L. R. 1041⁵ has been held to arise where succession is from Chela to Chela, that seems on further examination of the authorities to be limited to cases where the religious persons concerned are *grihasthas* and not celibates, so that there may be a conflict between the Chela and the natural heirs of the Guru. A Sanyasi's heir is always his Chela. Mr. Shah has pointed out quite correctly that these particular Sadhus have evidently not renounced the world completely because they are permitted to acquire and dispose of property and carry on business. Nevertheless they admittedly belong to a celibate order, and so far as we know there has never been any question of any property held by them, whether trust property or secular property, going by succession to any one but their Chelas. Under the circumstances we are not prepared to say that the fact that all these properties have been held by Chelas gives rise to any presumption."

In the present case Ganesh Das and his successors (predecessors?) were Bairagis and there is nothing on record to show that any of them had natural heirs and there was ever a conflict between the latter and the Chelas. Accordingly, I hold that there is no force in this contention of the counsel. Apart from this, the revenue records show that succession did not always devolve from the Guru to the Chela. In 1884 two persons Brahm Das and Gharib Das held the property in equal shares. Brahm Das's share

descended to Janki Das and on Janki Das's death to Ganesh Das. Gharib Das was succeeded by Kahan Das, and Kahan Das by Makhan Das. In 1925 Makhan Das transferred his share to the Thakardwara. The very idea of a Chela succeeding the Mahant is that he represents the institution; but when the property is divided between two Chelas and each of them succeeds to half the share, the inference is that the property did not belong to the institution. It was stressed by the counsel that had the occupancy holding not belonged to the institution, the landlords would never have allowed the Chelas to succeed to it, but I do not think that this fact can be regarded as conclusive, because it may be that the land was not valuable and the landlords did not care much for it or it may be that they were perfectly satisfied with the new occupancy tenants who took the place of old ones and did not like to exercise their right. The condition in respect of the proprietary land is somewhat different, inasmuch as there were no landlords whose rights could clash with those of the Chelas, but this difference is against the appellant and all that I have said about the occupancy holding applies with greater force to this land. I, therefore, hold that there is no scope whatever for raising any presumption that the land belonged to the institution.

[6] The second point urged by the learned counsel for the appellant was that so far as the occupancy holding was concerned, even assuming that it was Ganesh Das's personal property, the plaintiff could not succeed to it, for the simple reason that he being Ganesh Das's collateral and not grandson, his case fell within the purview of cl. (d) of sub-s. (1) of S. 59 and according to the proviso to that clause it was incumbent upon him to prove that the land was occupied by common ancestor, which he has not done. All that the respondent's counsel had to say on this point was that the matter was not put specifically in issue and the plaintiff should be given an opportunity of proving that the land was once in the occupation of Manohar Das who was the common ancestor of the plaintiff and Ganesh Das. Now it has to be remembered that it was the plaintiff who came to Court with the claim that he was entitled to succeed to Ganesh Das as an occupancy tenant and it was his duty to prove that he possessed that right under S. 59. It cannot be denied that when a person is not the lineal descendant of the deceased occupancy tenant in the male line and claims the right of succession on the ground that he is his male collateral relative in the male line of descent from the common ancestor of the deceased tenant and himself, it is for him first to allege and then to prove that the common ancestor

occupied the land. The plaintiff made no such allegation in his plaint. On the other hand, he wrongly described himself as Ganesh Das's grandson. Besides this we have before us complete revenue records going down to 1852 and it is clear from them that Ganesh Das got the land not from his father Manohar Das but from Janki Das whose Chela he was. I, therefore, hold that this plea raised by the appellant's counsel must prevail and it must be held that so far as the occupancy holding is concerned, the plaintiff had not been able to prove that he had the right to succeed to it.

[7] In the result I would accept the appeal in part, set aside the decree of the Courts below in the plaintiff's favour in respect of the occupancy holding and dismiss the plaintiff's suit so far as it relates to it. I would leave the parties to bear their own costs throughout.

Khosla J. — I agree.

R.G.D.

Appeal partly allowed.

A. I. R. (35) 1948 East Punjab 43 [C. N. 18.]

ACHRU RAM J.

Ganga Ram — Plaintiff — Appellant v. Ishar Singh and others — Defendants — Respondents.

Second Appeal No. 1575 of 1946, Decided on 24-3-1948, against decree of Senior Sub-Judge, Jullundur, D/- 5-4-1946.

Punjab Pre-emption Act (1 [I] of 1913), S. 15 (b), thirdly—Sale of property acquired by vendor under a revertible gift — All descendants or collaterals of donor who can claim that property by doctrine of reversion on extinction of donee's line are persons entitled to inherit and therefore entitled to pre-empt.

The right of pre-emption has been given by the statute to all persons who might inherit the land on the death of the vendor and not merely to the nearest heir or to the person having an immediate right to succeed. Accordingly, where the property sold has come to the vendor by means of a revertible gift, or has devolved upon him from a lineal descendant who acquired it by means of such a gift, all descendants or collaterals of the donor who may possess the right to claim the benefit of the doctrine of reversion must be regarded as falling within the category of the persons "who but for such sale would be entitled on the death of the vendor, to inherit the land or property sold" who have been given, by sub-clause "thirdly" of cl. (b) of S. 15, Punjab Pre-emption Act, a right to pre-empt the sale: 12 P. R. 1892 and 131 P. R. 1908, *Rel. on.* [Para 3]

Hence where the land sold by the vendor had been gifted to him under a revertible gift, the son of the donor who would be entitled to the property by reversion after the extinction of the donee's line, would be entitled to pre-emption under S. 15 (b), thirdly. [Para 6]

Cases referred:—

1. ('92) 12 P. R. 1892 (F. B.), *Sita Ram v. Raja Ram.*
2. ('91) 4 P. R. 1891 (F. B.), *Gholam Mahomed v. Mahomed Baksh.*
3. ('08) 131 P. R. 1908, *Dat Ram v. Shiv Ram.*

P. C. Jain for Shamair Chand—for Appellant.
K. C. Nayar —for Respondents.

Judgment. — This is a second appeal from the judgment of the learned Senior Subordinate Judge of Jullundur affirming on appeal the decision of the Subordinate Judge of Nawanshahr dismissing the plaintiff's suit for possession of 2 kanals and 12 marlas of land by means of pre-emption.

[2] The land in dispute was sold on 13.6.1941 by Gabia defendant 2 to Ishar Singh defendant 1 for a consideration of Rs. 180. The plaintiff sued to pre-empt the sale on the ground that the land had originally been gifted by his father Natha to Gabia, that the land in the hands of Natha was ancestral qua him, and that on the extinction of Gabia's line it would revert to him as the son of the original donor. Both the Courts below have held that on the extinction of Gabia's line the land in suit will revert to the plaintiff as a son of the donor. They have, however, dismissed the suit on the ground that such right of reversion did not make the plaintiff a person entitled to inherit the land sold on the death of the vendor within the meaning of sub-cl. "thirdly" in cl. (b) of S. 15, Punjab Pre-emption Act.

[3] After hearing the learned counsel for the respondent at length I am of the opinion that the judgment of the learned Senior Subordinate Judge cannot be sustained. It having been held that the gift by Natha to Gabia was a revertible gift and that on the extinction of the donee's line the land gifted must revert to the line of the donor, the plaintiff as the son of the donor is quite obviously a person entitled to inherit the land sold on the death of the vendor. The right of pre-emption has been given by the statute to all persons who might inherit the land on the death of the vendor and not merely to the nearest heir or to the person having an immediate right to succeed. Accordingly where the property sold has come to the vendor by means of a revertible gift, or has devolved upon him from a lineal descendant who acquired it by means of such a gift, all descendants or collaterals of the donor who may possess the right to claim the benefit of the doctrine of reversion must be regarded as falling within the category of the person "who but for such sale would be entitled, on the death of the vendor, to inherit the land or property sold" who have been given, by sub-cl. "thirdly" of cl. (b) of S. 15, Punjab Pre-emption Act, a right to pre-empt the sale.

[4] The view taken by the two Courts below that when land comes to a descendant or a collateral of the donor on its reversion to the line of the donor on the extinction of the donee's line, such descendant or collateral cannot be said to inherit the land is obviously incorrect and not

supported by any authority. Whether the property devolves on the personal heir of the last holder or reverts to some previous holder or to the heir or heirs of such holder, in either case it must be regarded as a case of inheritance. In the former case it may be said to be a case of direct inheritance and in the latter it may be regarded as one of inheritance by reversion. For example, if in a tribe governed by custom in matters of succession, a widow dies possessed of property inherited by her from her husband, and also of property which she has herself acquired, the inherited property will revert to her husband's heirs and the self-acquired property will devolve on her personal heirs. I do not think it will be seriously contended by any one that the latter is, but the former is not, a case of inheritance. Indeed, in custom, collateral succession, whether it takes place on the death of a male who is regarded as a full owner, or on the death of a female holding only on a life tenure, is always regarded as a case of reversion, the principle governing such succession being that in the event of the last holder dying without male issue the property reverts to the nearest ancestor who has left male descendants and devolves on such descendants. The learned Senior Subordinate Judge has himself conceded that in inheritance the heir may derive his right to succeed either from the last holder or from the common ancestor. The right to the reversion of donated property is also derived from the ancestor common to the donor and the claimant and I do not see how, on the learned Judge's own reasoning such reversion can be looked upon as something different from inheritance. I must confess my inability to follow the observations of the learned Judge that the reversion of gifted property is not a part of the law of inheritance but pertains to the law of gifts. When the holder, for the time being, of gifted property dies, the question that arises, concerning the devolution of such property, necessarily is who is entitled to inherit the same. If he has left lineal descendants they will of course inherit it. If he has died without leaving such descendants, and, having regard to the nature of the property gifted and the relationship existing between the donor and the donee, the principle of reversion to the line of the donor is applicable, the donor or, failing him, his descendants, or, failing them, his collaterals, provided the property can be traced to an ancestor common to themselves and the donor, will inherit it. I have been unable to discover any warrant, either on principle or in any precedents, for the assumption that the devolution of the property, in the latter case, has to be regarded as something different from inheritance. On the other hand, the following

passage in the Full Bench judgment in 12 P. R. 1892¹ in which the rule of reverter of donated property to the line of the donor on the donee leaving no lineal heirs was fully explained and which is the leading authority on the subject affords a complete reply to the entire argument contained in the judgments of the two lower Courts and clearly shows that a case of reversion is no less a case of inheritance than one of devolution of the property on the personal heirs of the last holder:

"The general principle which regulates succession to ancestral land in a Punjab village community is fully explained in the Full Bench case in 4 P. R. 1891.² It is there shown that the property of a man who dies without issue first reverts to the ancestor, and then descends to the male lineal descendants of that ancestor. Thus a brother succeeds a sonless brother, not as a brother, but because the estate reverts to the father and descends again to his sons. So, too, a mother succeeds, not as a mother, but as the widow of the father to whom the estate has ascended. This also explains what is called 'the principle of representation.' Applying this rule to the case of adopted sons, or donees, who have left no lineal heirs, it is clear that the estate would be treated as ascending to the person from whom the adopted son or donee derived his title; if, as would almost invariably be the case, that person left no male lineal descendants, the estate would ascend still higher in his line, until an ancestor was found, who had held the estate, and had left descendants. I think that there can be no doubt that the principle laid down in 4 P. R. 1891² is the true principle of succession, and under it the persons called, in the cases before us, the collaterals of the donor or adopter have an undoubted right to succeed in preference to the collaterals of the donee, or adopted son, who have really no right of succession at all."

[5] The question arising in the present case is by no means *res integra* and is fully covered by a judgment of a Division Bench of the Punjab Chief Court in 131 P. R. 1908.³ The learned Senior Subordinate Judge has sought to distinguish it on the ground that in that case the vendor had not got the property by means of gift but had got it by means of succession. It is, in my view, impossible to distinguish the judgment on this ground. The person suing to pre-empt the sale was not a personal heir of the vendor. He claimed a superior right of pre-emption on the ground that on the extinction of the vendor's line the property was to revert to him as representing the line of the original owner. The rule of reversion to the original line applies not only to cases of gifts but also to cases where the property had been allowed, for some special reasons, to devolve on a blood relation not in the ordinary line of inheritance, the custom recognising the right of the line of the original owner to get the property in preference to the heirs of the person on whom it had been allowed to devolve other than his lineal descendants. In so far as the operation of the rule of reversion is concerned, the case of a donee is at par with

that of a person in whose favour a diversion of the ancestral estate has otherwise been allowed.

[6] For the reasons given above, disagreeing with the view of law taken by the two Courts below, I hold that the plaintiff is a person entitled to inherit the suit land and, therefore, has a right of pre-emption superior to that of the vendee who does not claim such a right. I accordingly allow this appeal and setting aside the judgments and the decrees of the Courts below grant the plaintiff a decree for possession of the suit land by pre-emption subject to depositing by him into Court for payment to the vendee the sum of Rs. 180 after deducting therefrom any sum that may have been already deposited by him, on or before 25-5-1948. The plaintiff shall have his costs of all the Courts. In case of default in making the deposit as aforesaid the suit shall stand dismissed with costs of all the Courts.

K.S.

Appeal allowed.

A. I. R. (35) 1948 East Punjab 45 [C. N. 19.]

TEJA SINGH AND KHOSLA JJ.

Bela Singh — Plaintiff — Appellant v. Mt. Attari and others — Defendants — Respondents.

Second Appeal No. 554 of 1946, Decided on 25-2-1948, from decree of Dist. Judge, Hoshiarpur, D/-27-7-1945.

Civil P. C. (1908), O. 22, R. 3 (1) — 'Suit by reversioner that alienation by widow did not affect his reversionary interest under customary law—Plaintiff dying leaving widow and collaterals — Collaterals cannot continue suit—Civil P. C. (1908), S. 2 (11).

Where during the pendency of a suit for a declaration that a certain alienation by the widow of the plaintiff's deceased brother does not affect the plaintiff's reversionary interests in the property, which was alleged to be ancestral *qua* the plaintiff, the plaintiff dies and a person applies to be brought on record as a plaintiff in place of the deceased plaintiff, he has to satisfy the Court on two points (1) that he is the legal representative of the deceased and (2) that the right to sue survives. Where the plaintiff has left a widow and collaterals, the widow is the legal representative, representing his estate in law, even though her rights are limited and she has only a life estate under the customary law. The collaterals cannot continue the suit and cannot be substituted in place of the deceased plaintiff. [Para 2]

Annotation.—('44-Com) Civil P. C., O. 22, R. 1 N. 10.

Case referred :—

1. ('16) 43 I. A. 207 : 3 A. I. R. 1916 P. C. 117 : 39 Mad. 634 : 37 I. C. 161 (P. C.), Janaki Ammal v. Narayanasami.

D. N. Aggarwal — for Appellant.

K. C. Nayyar — for Respondents.

Teja Singh J. — One Sidhu had two sons Sundar and Thakur Singh. The suit property belonged to Thakur Singh who died leaving surviving him a widow, Mt. Ralli, and a daugh-

ter, Mt. Rao. Mt. Ralli gifted the suit land to Mt. Rao. Sundar brought the usual suit for a declaration that the property being ancestral *qua* him and Mt. Ralli's power to alienate it being restricted under the custom by which the parties were governed, the gift would not affect his reversionary interests. The suit was resisted *inter alia* on the plea that the gift amounted to acceleration of succession. Sundar died in the course of the suit. It is admitted that he left a widow but she took no interest in the suit. One Bishan Das, who claimed to be Sundar's adopted son, and Bela Singh and Surjan Singh, who alleged that they were Sundar's collaterals, applied to be brought on record as his legal representatives. Bishan Das later on dropped out and withdrew his application. His counsel made a statement that if he considered it necessary, he would bring a separate suit for establishment of his rights. On this his application was dismissed. As regards Bela Singh and Surjan Singh, the defendants at first denied that they had any right to be impleaded as plaintiffs in the place of Sundar. Later on, however, they admitted that they were Sundar's legal representatives but denied that they could continue the action. The Courts below have come to the conclusion that since the property was not proved to be ancestral *qua* Bela Singh and Surjan Singh, they had no right to challenge the gift in Mt. Rao's favour, and further holding that Mt. Rao was the next heir to the suit land have dismissed the suit. Bela Singh alone has preferred this second appeal.

[2] I am of the opinion that the appeal must fail on the short ground that neither Bela Singh nor Surjan Singh was the legal representative of Sundar *qua* the suit land and they had no right to take the place as plaintiffs in the suit. Rule 3, sub-r. (1) of O. 22, Civil P. C., lays down that when a sole plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. This means that when a person applies to be brought on record as a plaintiff in place of a deceased plaintiff, he has to satisfy the Court on two points: (1) that he is the legal representative of the deceased and (2) that the right to sue survives. The term "legal representative" has been defined in sub-s. (11) of S. 2, Civil P. C., as meaning a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The appellant's counsel contended that though Sunder has left

behind a widow, the appellant and the other collateral of Sundar represented his estate in law, for the reason that the widow's rights were limited and she only had the life estate. In my opinion, there is no force in the contention whatsoever. It is correct that a widow governed by Customary Law succeeds only to a life estate. It is also correct that there are certain restrictions placed upon her rights of alienation, but none the less she is the heir of her deceased husband and so long as she is alive, she alone represents his estate. As has been observed in a large number of decided cases, unless there is a special custom to the contrary, the presumption is that a widow succeeding to her husband under custom has the same sort of estate as a Hindu widow and as regards the nature of widow's estate under Hindu law S. 176 of Mulla's Hindu Law sums up the whole position in these words:

"A widow or other limited heir is not a tenant-for-life but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death. The whole estate is for the time vested in her and she represents it completely. As stated in a Privy Council case in 43 I. A. 207¹ 'her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but . . . so long as she is alive no one has any vested interest in the succession'."

The appellant's counsel further argued that since Sundar's suit was brought in a representative capacity and had he obtained any decree, that would have enured for the benefit of all the collaterals, every collateral should in law be regarded as his legal representative. I do not find any substance in this contention either, because according to the concluding words of sub section (11) of S. 2 quoted above when a party sues in a representative character, the person on whom the estate devolves on the death of the party so suing is his legal representative. In this case, it is not denied that according to custom the widow represents her husband in collateral succession and as long as she is alive, none of her husband's collaterals can have any concern with the share to which her husband would have been entitled. Accordingly Sundar's widow alone was his legal representative.

[2] The result, in my opinion, is that the appeal must fail and is dismissed with costs.

Khosla J.—I agree.

R.G.D.

Appeal dismissed.

A. I. R. (35) 1948 East Punjab 47 [C. N. 20.]

TEJA SINGH J.

Sunder Singh—Defendant—Appellant v. Faqir Chand—Plaintiff—Respondent.

Second Appeal No. 1660 of 1945, Decided on 27-11-1947, from order of Senior Sub-Judge, Jullundur, D/- 7-5-1945.

(a) Interpretation of statutes — Enactment "extending" to particular area and its "coming into force" in that area — Distinction pointed out — Analogous words — There is presumption that they have different meanings.

There is considerable difference between an enactment extending to a particular area and its coming into force in that area. The term "extends" is not quite analogous to the phrase "shall come into force." When it is laid down in an enactment that it extends to the whole of a country or a part of it, it does not necessarily mean that it is also in force therein, particularly when there is an express provision that before it can come into force something further, such as the issue of a notification, is to be done. [Para 5]

Even if it be conceded for the sake of argument that the terms "extends" when used in an enactment without any qualification can be considered as analogous to the phrase "shall come into force." when they appear in two sub-sections of the same section dealing with the applicability of the enactment, of which the section forms part, obviously they cannot mean the same thing. Where analogous words are used, each may be presumed to be susceptible of a separate and distinct meaning, for the Legislature is not supposed to use words without a meaning. [Para 5]

(b) Punjab Urban Rent Restriction Act (10 [X] of 1941), S. 1 (2) and (3) — Notification bringing Act into force in a certain Cantonment — Act applies except provisions relating to house accommodation.

Since according to sub-s. (3) of S. 1 the Provincial Government has been expressly empowered to bring the Act into force in any urban area, it is futile to urge that when the Government issues a notification bringing the Act into force in a cantonment, even those provisions of it which cannot possibly have any effect upon the regulation of house accommodation therein do not apply to that cantonment. All that the words "nothing herein contained shall be deemed to affect the regulation of house accommodation in any cantonment area" mean is that the provisions of the Rent Restriction Act shall have no effect upon the action that the cantonment authorities may take in that connection. [Para 6]

(c) Punjab Urban Rent Restriction Act (10 [X] of 1941), S. 10 — Notification bringing into force Act in Jullundur Cantonment — S. 10 does not apply by virtue of its proviso.

When the Government once exercises power under sub s. (3) of S. 1 and issues a notification applying the Act to a certain urban area the result is that every part of the Act comes into force in the urban area in question. Section 10 is as much part of the Act as any other section thereof and when the Government issues a notification that the Act shall be enforced in any cantonment area, like other sections of the Act that section would also apply to that cantonment area. But the last proviso to the section itself lays down that it shall not apply to any cantonment areas and in order to give effect to the proviso the applicability of the section to a cantonment area included in the notification must be ruled out. To hold otherwise would be to apply only a part of S. 10 and to ignore the last proviso.

Consequently by notifying Jullundur Cantonment as one of the urban areas in which the Act was to be enforced, it cannot be said they intended to apply that section to the said cantonment. Hence by virtue of the last proviso to S. 10, that section does not apply to Jullundur Cantonment. [Para 7]

R. P. Khosla — for Appellant.

A. M. Suri for Asa Ram Aggarwal

— for Respondent.

Judgment.—The facts of the case are given at length in the judgment of the lower appellate Court and it is not necessary to recapitulate them here.

[2] The only question in this second appeal is whether S. 10, Punjab Urban Rent Restriction Act 10 [X] of 1941, was in force in Jullundur Cantonment.

[3] The Act received the assent of His Excellency the Governor-General on 15-5-1941 and was published in the Punjab Gazette on 23-5-1941. Sub-section (2) of S. 1 provides that the Act extends to all urban areas in the Punjab but "nothing herein contained shall be deemed to affect the regulation of house accommodation in any cantonment area." The words of sub-s. (3) of S. 1 are:

"It shall come into force in such urban areas and on such dates as the Provincial Government may, by notification in the Official Gazette, appoint in this behalf, and shall remain in force in each such area for five years from the date of its enforcement in that area unless such period is extended by a resolution of the Punjab Legislative Assembly."

On 3-7-1941, the Government Punjab issued Notification No. 2038-C-41/34914 saying that in exercise of the powers conferred by sub-s. (3) of S. 1 of the Act the Governor of the Punjab was pleased to direct that the Act should come into force in the areas specified in the schedule annexed to the Notification and with effect from the date of the Notification. Jullundur Cantonment was one of the areas mentioned in the Schedule.

[4] Section 10 of the Act, deals with the conditions of statutory tenancy. Sub-section (1) of it lays down that no order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Act and performs the other conditions of the tenancy. The proviso to this sub-section reads as follows:

"Provided that the Court shall make an order for the recovery of possession if the landlord satisfies the Court that six months' notice to quit or notice of such period as may be required under the contract of tenancy, whichever be longer, has been served on the tenant."

Sub-section (2) lays down that where any order of the kind mentioned in sub-s. (1), has been made on or after 1-1-1939, but not executed before the commencement of this Act, the Court by which the order was made may, if it is of opinion that the order would not have been

made if this Act had been in operation at the date of making of the order, rescind or vary the order in such manner as the Court may think fit for the purpose of giving effect to this Act. Then follow two provisos to the section. The first proviso is to the effect that nothing in the section shall apply where the tenant has committed any act contrary to the provisions of cls. (o) and (p) of S. 108, T. P. Act or has been guilty of conduct which is a nuisance etc., or where the premises are reasonably and *bona fide* required by the landlord for certain purposes specified in the proviso, or where the landlord can show any cause which may be deemed satisfactory by the Court. The second proviso is worded as below :
: "Provided further that this section shall not apply to any Cantonment areas".

[5] To start with the appellants' counsel made an effort to show that according to sub-s. (2) of S. 1, the Act does not apply to any cantonment area and that notwithstanding sub-s. (3) of S. 1 the Provincial Government had no power to extend its provisions to any cantonment. The contention appears to me to be wholly untenable. From what I have said above, it will be seen that the words of sub-s. (2) are quite different from those used in the first part of sub-s. (3). All that sub-s. (2), lays down is that the Act extends to all urban areas in the Punjab, but it is provided in sub-s. (3) that in order that it shall come into force in any such urban area a notification to this effect in the Official Gazette by the Provincial Government is essential and that the date of the enforcement in the urban areas included in the notification will be the date of the notification. It need not be pointed out that there is considerable difference between an enactment extending to a particular area and its coming into force in that area and that the term "extends" is not quite analogous to the phrase "shall come into force". When it is laid down in an enactment that it extends to the whole of a country or a part of it, it does not necessarily mean that it is also in force therein, particularly when there is an express provision that before it can come into force something further, such as the issue of a notification, is to be done. It may also be mentioned that even if it be conceded for the sake of argument that the term "extends" when used in an enactment without any qualification can be considered as analogous to the phrase "shall come into force", when they appear in two sub-sections of the same section dealing with the applicability of the enactment, of which the section forms part, obviously they cannot mean the same thing. This is one of the fundamental principles governing the construction of statutes. Reference in this connection may be made to

p. 322 of Maxwell on Interpretation of Statutes wherein it is stated that when analogous words are used, each may be presumed to be susceptible of a separate and distinct meaning, for the Legislature is not supposed to use words without a meaning. Reading therefore sub-s. (2) of S. 1 with sub-s. (3) of the section my opinion is that the intention of the Legislature was to provide the Government with a ready-made law and to empower it to bring that law into force in any urban area and from any date that it may like.

[6] As regards the effect of the second part of sub-s. (2) wherein it is provided that nothing herein contained shall be deemed to affect the regulation of house accommodation in any Cantonment area. I do not agree with the appellant's counsel that it excludes altogether all urban areas from the operation of the Act. It is common knowledge that cantonment areas are primarily meant for the accommodation of the military and as I read the words of sub-s. (2), all that they appear to me to mean is that the provisions of the Rent Restriction Act shall have no effect upon the action that the cantonment authorities may take in that connection. It will be seen that the expression "urban area" as defined in cl. (f) of S. 2 means any area administered by a municipal corporation, a municipal committee, a cantonment board, a small town committee, a notified area committee or other authority etc. and since according to sub-s. (3) of S. 1 the Provincial Government has been expressly empowered to bring the Act into force in any urban area, it is futile to urge that when the Government issues a notification bringing the Act into force in a cantonment, even those provisions of it which cannot possibly have any effect upon the regulation of house accommodation therein do not apply to that cantonment.

[7] Having failed to convince me about the correctness of his first position the appellant's counsel then adopted a different line. He argued that by virtue of the notification the whole Act, including S. 10, became applicable to Jullundur Cantonment. When his attention was drawn to proviso 2 to S. 10 which clearly lays down that that section shall not apply to any cantonment areas, his reply was that the proviso became ineffective in view of the Government notification. I do not see any force in this contention either. It is correct that sub-s. (3) of S. 1 vests the power to bring the Act into force into an urban area in the Provincial Government but when the Government once exercises power under this sub-section and issues a notification, the result is that every part of the Act comes into force in the urban area in question. Now, S. 10 is as much part of the Act as any other section thereof and when the Government issues a

notification under sub-s. (3) of S. 1 that the Act shall be enforced in any cantonment area like other sections of the Act this section would also apply to that cantonment area, but the last proviso to the section itself lays down that it shall not apply to any cantonment areas and in order to give effect to the proviso the applicability of the section to a cantonment area included in the notification must be ruled out. To hold otherwise would be to apply only a part of S. 10 and to ignore the last proviso, which we cannot do. We must presume that while issuing the notification under sub-s. (3) of S. 1 bringing the Act into force *inter alia* into Jullundur Cantonment, the Provincial Government were aware of all the provisions of the Act and they knew that by virtue of the last proviso to S. 10 that section does not apply to any cantonment areas. Consequently by notifying Jullundur Cantonment as one of the urban areas in which the Act was to be enforced, it cannot be said that they intended to apply that section to the said cantonment. Section 3 of the Act gives the Provincial Government power to exempt any particular premises or class of such premises from the applicability of all or any of the provisions of the Act, and if the Government intended that in spite of the last proviso to S. 10 that section should apply to houses or shops in that cantonment they could have very easily directed that the said proviso shall not apply to them. The section which reads as below, is very widely worded and gives unlimited power of exemption to the Government:

"Section 3. The Provincial Government may direct that all or any of the provisions of this Act shall not apply to any particular premises or class of such premises."

For all these reasons, I hold that by virtue of the last proviso to S. 10, that section did not apply to Jullundur Cantonment. This was the view taken by the learned Senior Subordinate Judge. So the appeal is dismissed but the parties are left to bear their own costs throughout.

R.G.D.

Appeal dismissed.

A. I. R. (35) 1948 East Punjab 49 [C. N. 21.]

ACHRU RAM AND KHOSLA JJ.

Shadi Ram and another — Plaintiffs — Appellants v. Ram Kishen and others — Defendants — Respondents.

First Appeal No. 115 of 1943, Decided on 1-12-1947, from decree of Sub-Judge, 1st Class, Delhi, D/- 16-12-1942.

(a) Trusts Act (1882), S. 6—Uncertainty—Object of trust, "advancement of medical aid to human beings or for other charitable purpose in accordance with the absolute discretion" of trustees — Trust held void for uncertainty and vagueness.

The trust in order to be valid must be of such a nature that its execution and administration can be

controlled by the Court and that for that purpose it is necessary that both the subject and the object of the trust must be such as can be ascertained by the Court. If the subject or object cannot be ascertained from the deed of trust itself, the Court cannot enforce the trust. If the trust deed has left the object of the trust undetermined or has left it to the trustees to determine the same, it cannot be said that the object for which the trust was created by its author is capable of being ascertained by the Court. If the Court has got to find out the object of the trust outside the trust-deed or if it is left to the trustees appointed by the deed to determine what the object of the trust should be, the object determined by the Court or by the trustees cannot be regarded, by any stretch of imagination, as the object of the trust as created by the author and a Court enforcing the administration of the trust for such an object cannot be said to be securing the administration of the trust as created by the founder, but will, in effect and in substance, be creating a trust in his name and on his behalf which the law does not seem to contemplate.

[Para 14]

The object of the trust was stated in the trust-deed as follows:

"Interest to be used and applied in the first instance, if the Delhi University accept our proposals to open an Oriental Faculty of Sanskrit, to establish a Sanatan Dharm College or a School in Delhi to prepare students for the said faculty and to maintain the same. The trustees shall in this respect appoint a committee to manage the said College or School. Should, however, the said Oriental Faculty be not created within a period of one year, the said trustees shall have the right to use the said trust property for advancement of medical aid to human beings or for other charitable purpose in accordance with their absolute discretion. No faculty had been set up by the Delhi University within a year or for the matter of that, till the suit :

Held that the first object of the trust had failed. If and when such a faculty were set up by the University, the plaintiffs or any other person interested might by instituting proper proceedings obtain from the Courts a decision on the subject, and if time was held to be not of the essence of the trust-deed might still succeed in enforcing the trust for the establishment of a College or a School in Delhi.

[Para 9]

Held further that if the trust-deed had simply provided for the trust property being used for the advancement of medical aid to human beings, the object of the trust could not be held to be either vague or uncertain. The authors of the trust, however, had distinctly provided that the trust property could be used either for the advancement of medical aid to human beings or for any other charitable purpose according to the discretion of the trustees. The other charitable purposes were not defined and the deed left it open to the trustees not to use any part of the trust property for the advancement of medical aid to human beings and to use the whole of it for any other charitable purpose, it also being left to them to select the charitable purpose for which to use the trust property. If the trustees in the exercise of their absolute discretion used the trust properties for any purpose which they considered to be charitable, the Court could not exercise any control over the administration of the trust by them, could not determine whether or not the purposes for which the trust property was used were in fact charitable purposes and could not compel them to use any part of the trust properties for the advancement of medical aid to human beings.

[Para 10]

The words "for other charitable purpose" as occurring in the deed could not be construed to mean other charitable purpose *eiusdem generis* with what preceded those words, namely, advancement of medical aid to

human beings, in view of the fact that by the concluding words of the clause the trustees were given an absolute discretion in determining to what charitable purposes the income of the trust property was to be applied in case the same was not applied to the advancement of medical aid to human beings. Consequently, the trust suffered from the defect of vagueness and uncertainty and was therefore void: 23 Bom. 725. (1804) 10 Ves. 522, (1896) 2 Ch. 451, 20 A. I. R. 1933 Lah. 833, 78 P. R. 1912 and 31 Bom. 583, *Rel. on*; 1902 A. C. 37, *Expl.* [Paras 10, 13, 15 and 17]

(b) Trusts Act (1882), S. 6 — Uncertainty — English Law—Endowment for "charity" in England is not void for vagueness but it is not so with regard to Hindu trust.

A trust expressed to be created for charity in England will be regarded as a trust created for one of the purposes falling within the technical meaning of charity as understood in English Law the administration of which will be supervised and controlled by the Charity Commissioners appointed under that law for the purpose. A person executing a deed of trust in that country and founding an endowment for charity may thus be reasonably understood to have in contemplation whatever is regarded by the Law of his country as charity and the trust purporting to have been created by him cannot, therefore, be regarded as void for vagueness: 78 P. R. 1922, *Ref.* [Para 13]

But a trust by a Hindu, expressed to have been created for charitable purposes without any further attempt to define the purpose or object of the trust cannot but be regarded as vague and uncertain; the reason being that amongst Hindus the words "charitable purpose" have such a diversity and variety of connotations that what one set of persons may regard as a charitable purpose may not be regarded as such by another set and may even be regarded as sinful by a third set. [Para 16]

(c) Hindu law—Alienation — Manager — Joint family consisting of two brothers with their sons—Partition between brothers—Subsequent execution of charitable trust by brothers of family properties—Partition creates two new joint families each consisting of one brother and his sons — The sons of the two brothers can challenge the trust as an alienation of joint family property which is prejudicial to their interests. [Para 17]

(d) Trust—Right to sue — Persons having interest can alone sue—Civil P. C. (1908), S. 92.

In order to be entitled to maintain a suit for the preservation of or for any other relief respecting trust property, the plaintiff must show that he has got an interest which is more than a purely sentimental interest in the subject-matter of the trust. [Para 18]

Annotation. — ('44-Com.), Civil P. C., S. 92, N. 8.

(e) Trust — Creation of — Money in dharmada Khata—No dedication proved—Money is not trust money—Purchase of property by such money is not trust property—Trusts Act (1882), S. 6.

In the absence of any evidence and even of any suggestion that the money in the dharmada Khata had been dedicated to any particular purpose that money cannot be regarded as trust money and under these circumstances the mere fact of a part of that money having been used for the acquisition of the shares in a certain company cannot make the shares trust property. [Para 20]

(f) Hindu law—Religious endowment—Dedication—Actual user by public held amounted to dedication.

Where a certain dharamsala was built for the use of the public and had been actually so used without any let or hindrance, it could not be held otherwise than as property dedicated to the use of the public although the

act of formal dedication was not proved to have taken place. [Para 22]

(g) Trust—Public — Endowment to dharamsala is public trust.

An endowment to dharamsala cannot be a private trust. The endowment, by its very nature is meant for use by the public. [Para 24]

(h) Civil P. C. (1908), S. 92—Scope — Suit merely for declaration that property claimed by defendants to be their private property was trust property does not fall under S. 92.

Where in a suit there is no allegation of breach of trust by any of the trustees and no relief is claimed against any trustee, but the suit is merely for a declaration that the property which was claimed by the defendants to be their private property was not in fact so but was trust property, the suit does not fall within the purview of S. 92 and no sanction either of the Advocate-General or of the Collector is necessary to make it competent. [Para 24]

Annotation : ('44-Com.) Civil P. C., S. 92 N. 2 Pt. 8.

Cases referred : —

1. ('99) 23 Bom. 725 : 26 I. A. 71 : 7 Sar. 543 (P.C.).
2. (1804) 10 Ves. 522, *Morice v. Bishop of Durham*.
3. (1896) 2 Ch. 451 : 65 L. J. Ch. 700 : 74 L. T. 706 : 45 W. R. 154, *In re Macduff*.
4. ('33) 14 Lah. 827 : 20 A. I. R. 1933 Lah. 833 : 146 I. C. 1013, *Narain Das v. Brij Lal*.
5. (1902) 1902 A. C. 87 : 71 L. J. P. C. 22 : 86 L. T. 157 : 50 W. R. 369.
6. ('12) 78 P. R. 1912 : 14 I. C. 247, *Bhai Gurdit Singh v. Sher Singh*.
7. ('07) 31 Bom. 583, *Trikumdas Damodar v. Haridas Morarji*.

A. N. Grover and N. L. Salooja for *Bhagwat Dayal*—for Appellants.

Dev Raj Sawhney, F. C. Mittal and Shamsheer Bahadur—for Respondents.

Achhru Ram J.—This judgment will dispose of two cross-appeals Nos. R. F. A. 115 and 116 of 1943. These appeals have arisen under the following circumstances.

[2] Madho Parshad, the father of Ram Kishan defendant 1 in the suit out of which these appeals have arisen and husband of Mt. Chhoti defendant 2, and Khusbi Ram, the father of Om Parkash and Hari Parkash defendants 3 and 4 and husband of Mt. Pan Bai defendant 5, were members of a joint Hindu family. Khusbi Ram was a son of Madho Parshad from another wife Mt. Bhagirathi but was adopted as a son by Mani Ram, the real brother of the aforesaid Madho Parshad, Mani Ram and Madho Parshad being the sons of Sham Lal and grandsons of one Gopal Chand. The family originally belonged to the village Kanod also called Mohindargarh in Patiala State. Gopal Chand, the grand-father of Madho Parshad, migrated to Delhi and set up business there under the name and style of Gopal Chand-Sham Lal. After the death of Gopal Chand, the business was carried on by Sham Lal and after the latter's death by his sons Madho Parshad and Mani Ram. There was a disruption of the joint Hindu family consisting of Madho Parshad and Khusbi Ram in 1927 when they divided the joint family property. On

4-1-1927 they executed two documents Ex. D 1, the partition deed, and Ex. P-1, a deed of endowment. By means of the latter they purported to create a public trust of four properties, namely. (1) a Dharamsala situate near Nahar Saadat Khan in Delhi, (2) a house property situate in the town of Kanod also known as Mohindargarh in Patiala State, (3) a shop situate in the town of Moga and (4) fifty preference shares of the value of Rs. 1000 each in Messrs Raj Nath & Co. Ltd. having its registered office in Cloth Market, Delhi, and one deferred share of the said Company. They appointed seven trustees for the purpose of carrying out the trust. It was provided that the income of the properties mentioned above was to be used and applied, in the first instance, in establishing a Sanatan Dharam College or School in Delhi to prepare students for Oriental Faculty of Sanskrit in case the Delhi University accepted their proposal to found such a faculty. It was further provided that in case such a faculty was not founded within a period of one year from the date of the execution of the document, the trustees were to have the right to use the trust property for advancement of medical aid to human beings or for other charitable purposes in accordance with their absolute discretion.

[3] Madho Parshad died in the same year a short time after the execution of the above-mentioned two documents. The trustees appointed by means of the deed of endowment seem to have taken possession of the trust properties and to have had the shares in Messrs Raj Nath & Co. Ltd. registered in their names.

[4] On 22-4-1932 Mt. Chhoti defendant 2 as the next friend of her son Ram Kishan defendant 1, a minor, brought a suit against the above mentioned trustees for recovery of possession of the properties mentioned above and also for accounts of the income realized by the defendants from those properties during the period of their possession alleging that the deed of endowment, also called the trust deed, was void and unenforceable. It was alleged that the property which formed the subject-matter of the trust was joint family property and Madho Parshad, the father of the plaintiff, had no right to create a trust thereof to the prejudice of the plaintiff, and that, in any case, the trust was void for vagueness and uncertainty. It was admitted that the Dharamsala had been dedicated by Madho Parshad and Khushi Ram before the execution of the deed of trust and was, therefore, trust property. It was, however, alleged that the original trust being complete and having been acted upon, Madho Parshad and Khushi Ram had no right to re-dedicate the said property and to vest the same in the trustees even if the trust-

deed of 1927 was otherwise held to be valid. Khushi Ram was not made a party to the suit and died in 1934 while the suit was still pending. The suit was finally disposed of by a Subordinate Judge of Delhi by means of judgment dated 25-2-1937 (Ex. D-3/4 printed at p. 176 of the paper book). The learned Subordinate Judge held that the Dharamsala had been dedicated by Madho Parshad and Khushi Ram and was, therefore, trust property before they partitioned joint family property. He, however, held the trust purporting to have been created by means of the trust-deed dated 4-1-1927 to be illegal and void by reason of the vagueness of the object of the trust. In view of this finding the possession of the trustees was held to be wrongful. The plaintiff was, in the result, granted a decree declaring the so-called trust to be invalid and unenforceable and permanently restraining the defendants from interfering with the management of the Dharamsala at Nahar Saadat Khan and the house in Chhetar at Mohindargarh and from realizing the rent of the Moga shop. The defendants were also directed to transfer the shares in Raj Nath & Co. Ltd. to the plaintiff. A preliminary decree was also passed for rendition of accounts in respect of the income from the properties forming the subject-matter of the trust-deed for the period during which the defendants had been receiving such income. A commissioner was appointed for the purpose of taking the accounts. Before, however, the commissioner could submit his report, on 20-5-1937 the parties entered into a compromise as a result whereof the plaintiff was paid by the defendants a sum of Rs. 590-14-0 in cash and also received a G. P. note of the value of Rs. 7000 and a fixed deposit of Rs. 65,564 with the Chartered Bank, Delhi, the trustees having purchased the aforesaid G. P. note out of the income of the so-called trust property and having deposited out of that income the aforesaid sum in the fixed deposit account with the Bank mentioned above.

[5] On 25-8-1937 Om Parkash and Hari Parkash defendants 3 and 4, the minor sons of Khushi Ram, through their mother Mt. Pan Bai defendant 5 as their next friend, brought against Ram Kishan and Mt. Chhoti and the trustees a suit for partition of the properties mentioned above and for accounts of the income of the said properties and recovery of the plaintiffs' share therein. On certain preliminary pleas raised by the defendants the learned Subordinate Judge to whom the suit was made over for trial held that the Court at Delhi could not entertain a suit for partition of immovable property situate in Patiala State and in Moga, that the Dharamsala property situate in Delhi being admittedly Dharamsala could not be partitioned by metes

and bounds and that other reliefs by way of injunction etc., claimed by the plaintiffs could also not be granted to them. In view of this order, the suit proceeded only in respect of the relief regarding accounts of the income of the properties covered by the trust deed. On 20.2.1939 the plaintiffs were granted a preliminary decree for accounts (*vide* Ex. D-3/6 printed at p. 204 of the paper book.) Both parties feeling aggrieved from the decree went up in appeal to the High Court at Lahore. A Bench of that Court disposed of the two appeals by means of their judgment dated 26.5.1941 (*vide* Ex. D-3/5 printed at p. 214 of the paper book.) Both the appeals were allowed and in lieu of the decree passed by the learned trial Judge the plaintiffs were granted a preliminary decree declaring that they and Ram Kishan defendant 1 were owners in equal shares of the shop at Moga Mandi, the amount realized by defendant 1 on account of the shares in Raj Nath and Company and the amount paid by the trustee to him in pursuance of the decree mentioned above; declaring further that an account be taken of the rents and profits of the shop at Moga Mandi and of the sums received by defendant 1 on account of the shares in Raj Nath and Company and from the trustees, and directing the shop and the amount found due to be divided amongst the plaintiffs and defendant 1 in equal shares. The plaintiffs were also granted a decree declaring that the Dharamsala at Nahar Saadat Khan was endowed property and impartible. The decree further directed that the Dharamsala should be under the joint management of the mothers of the plaintiffs and defendant 1, their natural guardians, under the supervision of the District Judge of Delhi; that the aforesaid guardians should keep regular accounts and file them quarterly in the Court of the District Judge; that if at any subsequent time by reason of one of the minors attaining majority or for any other cause the arrangement became impracticable, the District Judge, Delhi, should, after taking appropriate proceedings, frame a new scheme for management of the Dharamsala, and that an account of the income and expenditure of the Dharamsala be taken from defendant 1 from the date when he assumed charge from the trustees till the commencement of the joint management by Mt. Chhoti and Mt. Pan Bai and the amount so found due be invested in proper securities for the benefit and the purposes of the Dharamsala. The suit in respect of the house at Kanod was dismissed and so also the claim for account against the trustees.

[6] The suit out of which these two appeals have arisen was filed on 19.11.1941 by Shadi Ram and Nagarmal, two residents of Delhi, who claimed to be members of the Marwari com-

munity of Delhi, on behalf of themselves and of the aforesaid community, for a declaration that the Dharamsala situate at Nahar Saadat Khan in Delhi, the house situate in the village Kanod also known as Mohindargarh in Patiala State, the shop situate in Moga Mandi, half portion of an undivided Ghat on the bank of the river Jamna near Kudsia gardens, Delhi, the sum of Rs. 73,154-14-0 or thereabouts received by Ram Kishan and Mt. Chhoti, defendants 1 and 2, from the trustees as a result of the compromise in the suit filed by the latter as the next friend of the former in 1932, and the sum of Rs. 62,550 or thereabouts received by the aforesaid defendants from the liquidator of Messrs. Raj Nath and Company, Limited on account of fifty preference and one deferred share of the said Company were trust properties and were otherwise properties dedicated to charity and that the defendants could not use the same for their private purposes. The suit was resisted by defendants 3 to 5. Defendants 1 and 2 for all practical purposes supported the plaintiffs' claim. On the pleadings of the parties the learned trial Judge framed the following issues :

"1. Are properties Nos. 1, 2 and 4 mentioned in Sch. A appended with the plaint not dedicated for charitable purposes ?

2. Is property No. 3 mentioned in Sch. A appended with the plaint dedicated for charitable purposes ?

3. Is the sum of Rs. 73,154-14-0 referred to in para. 17 of the plaint and mentioned at No. 5 of Sch. A unspent income of dedicated property ?

4. Were fifty preference and one deferred shares of Messrs. Raj Nath and Company, Limited, dedicated for charitable purposes ?

5. Was the trust-deed, referred to in para. 9 of the plaint, void and not binding on the defendants, for reasons given in para. 9 of the written statement filed by defendants 3 to 5 ?

6. Is the present suit barred by the principle of *res judicata* by reason of findings given in the previous suits ?

7. Have the plaintiffs no *locus standi* to sue ?

8. Is property No. 1 mentioned in Sch. A appended with the plaint dedicated in the form of private trust ? If so, what is its effect ?

9. To what relief the plaintiffs are entitled ?"

[7] On the first issue it was held that property No. 1, i. e., the Dharamsala situate at Nahar Saadat Khan alone had been proved to have been dedicated for charitable purposes and that the two other properties, namely, the house at Kanod and one-half portion of the Ghat on the bank of the river Jamna had not been proved to have been so dedicated. On the second issue, it was held that the property mentioned therein, namely, the shop situate at Moga Mandi had not been proved to have been dedicated for any charitable purposes. On the third issue it was held that out of the sum of Rs. 73,154-14-0 handed over to defendants 1 and 2 by the trustees, a sum of Rs. 30,154-15-3 only represented the un-

spent income of the dedicated property i. e., the Dharamsala. The fourth issue was decided against the plaintiffs. On the fifth issue it was held that the trust-deed was void and not binding on the defendants by reason of the property covered thereby being joint Hindu family property of defendants 1, 3 and 4 and their respective fathers at the time of its execution and being too large a fraction of the entire joint family property to be validly dedicated to charitable or religious purposes by the managing members of the family. The other ground on which the validity of the trust-deed was attacked, namely, the vagueness and uncertainty of the object of the trust, was found against the contesting defendants and it was held that the trust was not void on that ground. The sixth issue was decided against the defendants. On the seventh issue, it was held that although the plaintiffs had failed to prove themselves to be the collaterals of the founders of the trust, they had a *locus standi* to maintain the suit by reason of being as Hindu citizens of Delhi interested in the subject-matter of the trust. The eighth issue was decided against the defendants. In the result, the plaintiffs were granted a decree declaring that the Dharamsala at Nahar Saadat Khan in Delhi was a public dedicated property and that out of the sum of Rs. 73,154-14-0 received from the trustees by defendants 1 and 2 in accordance with the terms of the compromise arrived at in the suit brought by the latter as the next friend of the former in 1932 a sum of Rs. 30,154-15-3 represented the unspent income of dedicated property on the date when the aforesaid money was handed over to the aforesaid defendants and was, therefore, to that extent dedicated to public charity. The rest of the plaintiffs' suit was dismissed. Both parties feeling aggrieved from the decree of the learned trial Judge have come up in appeal to this Court. The plaintiffs are the appellants in R. F. A. 115 of 1943 and pray for their claim being decreed in its entirety. Defendants 3 to 5 are the appellants in R. F. A. 116 of 1943 and claim the dismissal of the plaintiffs' suit in its entirety.

[8] After hearing the learned counsel for the parties, I am of the opinion that the trust purporting to have been created by means of Ex. P.1 must be held to be void and unenforceable on account of vagueness and uncertainty of the object of the trust and that the learned Subordinate Judge has gone wrong in holding to the contrary.

[9] The object of the trust was stated in the trust-deed as follows :

"Interest to be used and applied in the first instance, if the Delhi University accept our proposals to open an Oriental Faculty of Sanskrit, to establish a Sanatan Dharam College or a School in Delhi to prepare students

for the said faculty and to maintain the same. The trustees shall in this respect appoint from among themselves, or from outside or partly from each, a committee of not less than 11 members to manage the said College or School. Should, however, the said Oriental Faculty be not created within a period of one year, the said trustees shall have the right to use the said trust property for advancement of medical aid to human beings or for other charitable purpose in accordance with their absolute discretion."

It is not disputed that the Delhi University did not set up any Oriental Faculty of Sanskrit within one year of the date of the execution of the deed of trust. In fact, it is admitted that even up to the present moment no such faculty has been set up. Under these circumstances, the question of the income of the so-called trust property being applied to the first object mentioned in the deed does not and cannot arise. It was urged by the learned counsel for the appellants that there was evidence to show that correspondence had been passing between the University and some others in the matter of setting up an Oriental Faculty of Sanskrit and that there was yet the possibility of such a faculty being set up by the aforesaid University. It was urged that the period of one year within which such faculty had to be set up in order to make the provision for the income of the alleged trust property being utilized for the purpose of establishing a Sanatan Dharam College or School in Delhi becoming operative was not of the essence of the trust-deed and that such income could be utilized for the said purpose consistently with the provision contained in the trust-deed even if the faculty was set up by the University after the expiration of the aforesaid period and even at some time hereafter. No such faculty having so far been set up, it does not become necessary for us to decide whether the period within which, according to the express terms of the trust-deed, the faculty had to be set up in order to make the first part of the provision contained in the trust-deed to be applicable or operative was of the essence of the deed of trust or was merely recommendatory in its character, the trustees retaining the power to apply the income of the trust property to the establishment of a Sanatan Dharam College or School even if an Oriental Faculty of Sanskrit were set up by the University long after the expiration of the aforesaid period. The fact remains that no such faculty has so far been set up and the income of the trust property cannot accordingly under any circumstances be utilized for the purpose of establishing a Sanatan Dharam College or School. If and when such a faculty is set up by the University, the plaintiffs or any other person interested may by instituting proper proceedings obtain from the Courts a decision on the subject, and if time is held to be not of the essence of the trust deed, may still succeed in enforcing

the trust for the establishment of a College or a School in Delhi. For the purposes of the present litigation, it has to be assumed that the first object mentioned in the trust-deed does not exist and has failed. The trust-deed must, therefore, stand or fall with the second object mentioned therein, namely, using the trust property for advancement of medical aid to human beings or for other charitable purposes in accordance with the absolute discretion of the trustees.

[10] If the trust-deed had simply provided for the trust property being used for the advancement of medical aid to human beings, I have no doubt that the object of the trust could not be held to be either vague or uncertain. The authors of the trust, however, have distinctly provided that the trust property could be used either for the advancement of medical aid to human beings or for any other charitable purpose according to the discretion of the trustees. The other charitable purposes are not defined and the deed leaves it open to the trustees not to use any part of the trust property for the advancement of medical aid to human beings and to use the whole of it for any other charitable purpose, it also being left to them to select the charitable purpose for which to use the trust property. I do not find it possible to distinguish this case from the case *Runchordas Vandravandas v. Parvatibai* decided by their Lordships of the Privy Council whose judgment in the aforesaid case is reported as 23 Bom. 725.¹ In that case, the bequest purported to be for making Dharamdan which expression was understood to connote charitable or religious gifts. The bequest was held to be void for vagueness and uncertainty. In support of their decision their Lordships relied on the following dicta by Lord Eldon in (1804) 10 Ves. 522² at p. 539:

"As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust; a trust, therefore, which, in case of maladministration, could be reformed and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration."

Reference was also made by their Lordships to the judgment of Lindley, L. J., in (1896) 2 Ch. 451³ in which case the words of the bequest were "purposes charitable or philanthropic." The principle enunciated by Lord Eldon in the first mentioned case was applied by Lindley, L. J., to the case which he was called upon to decide and was held by him to be the correct principle governing cases of that type. Applying this principle to the present case, it is obvious that if the trustees in the exercise of their absolute discre-

tion used the trust properties for any purpose which they considered to be charitable, the Court could not exercise any control over the administration of the trust by them, could not determine whether or not the purposes for which the trust property was used were in fact charitable purposes and could not compel them to use any part of the trust properties for the advancement of medical aid to human beings.

[11] In 14 Lah. 827,⁴ one Devi Dial, a resident of Bhera, who had established a Dharamsala in Bhera called Dharamsala Devi Dial, executed a will in respect of his movable and immovable property. He appointed three gentlemen as the executors or trustees of the will and directed them to apply after his death in such a manner as they considered proper the money and property bequeathed to them for Dharamarth, the Dharamsala and Sanskrit education. Although out of the three objects of the trust created by the will two, namely, the Dharamsala and Sanskrit education were held to be quite definite and by no means vague, the whole bequest was held to be void and inoperative because of the third object of the trust being vague and uncertain and it having been left to the trustees to apply the trust funds to any of the three objects and in such proportion as they thought fit. Jai Lal, J. who wrote the judgment of the Bench, was personally inclined to take the view that a bequest for Dharamarth could not be regarded as suffering from the defect of vagueness or uncertainty. He was, however, definitely of the opinion that the case before him was clearly covered by the Privy Council judgment mentioned above which was binding on him although he thought that in the aforesaid judgment the true significance of the expression "Dharamarth" as understood among the Hindus had not been fully taken into consideration. This decision seems to me to be on all fours with the facts of the present case.

[12] The learned counsel for the appellants drew our attention to certain passages in the judgment of the House of Lords in *Blair v. Duncan*⁵ quoted at pages 834 and 835 of the report in 14 Lah. 827⁴ in which it was stated that if in the impugned devise the word "charitable" had stood alone and had not been followed by the words "or public," the devise would have been sufficiently definite and valid. It was urged that according to the view taken by the House of Lords, a bequest or a trust for charitable purposes could not be held to be void for vagueness or uncertainty and that accordingly the trust in the present case, which was created for charitable purposes only and in which the word "Dharamarth" had not been used, could not be regarded as invalid and unenforceable and could not be held to be governed by the judgment of their Lordships of the Privy

Council in 23 Bom. 725.¹ This argument of the learned counsel overlooks the fact that a bequest for charity in England comes within the recognized technical meaning of charity and it is for this reason that bequests for charity or charitable purposes in that country have been held to be not void for vagueness. The preamble to 43 Eliz. c. 4 defined what the English Law recognized as a charity and the consolidating Mortmain and Charitable Uses Act, 1888 (51 and 52 Vict. c. 52) which purported to repeal the former, in sub.s. (2) of S. 13, after reciting this definition at length provides that whereas in divers enactments and documents reference is made to charities within the meaning of the said Act, references to such charities shall be construed as references to charities within the meaning of the said preamble. In England and Wales under the provisions of the various Charitable Trusts Acts, Charity Commissioners are appointed with powers and duties to be found in those Acts. They exercise very extensive powers of management and control over charities, including power to authorise sales, exchanges, leases and mortgages of charity property; to frame new schemes where the original terms of the trust can no longer be literally or beneficially complied with; to investigate the accounts of charitable trusts; to sanction proceeding by the trustees and give them advice, and many other powers. Under the circumstances, a trust expressed to be created for charity in England will be regarded as a trust created for one of the purposes falling within the technical meaning of charity as understood in English Law the administration of which will be supervised and controlled by the Charity Commissioners appointed under that law for the purpose. A person executing a deed of trust in that country and founding an endowment for charity may thus be reasonably understood to have in contemplation what ever is regarded by the law of his country as charity and the trust purporting to have been created by him cannot, therefore, be regarded as void for vagueness. In 78 P. R. 1912⁶ a Division Bench of the Punjab Chief Court presided over by Sir Henry Rattigan and Robertson J. took the same view as to the implications of English cases which had upheld bequests for charity. That was a case in which the testator by one part of the will had left considerable property for being employed on Dharamarth. Following the Privy Council judgment in 23 Bom. 725¹ the learned Judges held the bequest to be void. In distinguishing the case from the English authorities they made the following observations :

"A bequest for 'charity' in England which comes within the recognized technical meaning of 'charity' is

not void for vagueness nor probably would a bequest in this country for any special charity".

[13] The learned counsel for the appellants drew our attention to S. 2, Charitable Endowments Act, VI of 1890, and contended that, like the English Law, the Indian statute had also defined charitable purposes and, therefore, any bequest made or trust created for charitable purposes must be deemed to have been made or created for the purposes covered by that definition and cannot, therefore, be held to be void for vagueness. The Act referred to by the learned counsel was passed in order to provide for the vesting and administration of property held in trust for charitable purposes. Section 2 of the Act runs as follows :

"In this Act 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship."

The language of the section clearly shows that the Act has not given and was not intended to give an exhaustive and comprehensive definition of what was to be regarded as a charitable purpose. It only provides that certain purposes amongst others which are left undefined should also for the purposes of the Act be regarded as charitable purposes. It is noteworthy that according to this section the advancement of any object of general public utility is also to be regarded as a charitable purpose. According to the judgment of the House of Lords in *Blair v. Duncan*⁵ relied on by the learned counsel for the appellants the addition of the words "or public" to the word "charitable" had the effect of rendering the bequest void for vagueness. In 31 Bom. 533⁷ although Chandavarkar J. and on Letters Patent Appeal Sir Lawrence Jenkins C. J. and Beaman J., relying on English authorities, appeared to be inclined to hold that a bequest or trust merely for purposes of charity would not be void for vagueness, held that a bequest "for purposes of popular usefulness or of charity" was void. If the words "charitable purpose" have to be construed with reference to the provisions of S. 2, Charitable Endowments Act 6 [VI] of 1890, it follows that "the advancement of objects of general public utility" must also be deemed to be included in them and there can be no manner of doubt at all that even according to the authorities relied on by the learned counsel for the appellants, on that construction of the charitable purposes the trust must be deemed to suffer from the defect of vagueness and uncertainty.

[14] I cannot accept the contention of the learned counsel for the appellants that the Privy Council judgment in 23 Bom. 725¹ can only apply if the gift or bequest sought to be impugned is made for Dharam or Dharamarth and that

in the absence of use of the words "Dharam" or "Dharamarth" the gift or bequest cannot be said to be hit by the judgment of their Lordships. As I read that judgment, it lays down the principle that the trust in order to be valid must be of such a nature that its execution and administration can be controlled by the Court and that for that purpose it is necessary that both the subject and the object of the trust must be such as can be ascertained by the Court. If the subject or object cannot be ascertained from the deed of trust itself, the Court cannot enforce the trust. If the trust-deed has left the object of the trust undetermined or has left it to the trustees to determine the same, it cannot be said that the object for which the trust was created by its author is capable of being ascertained by the Court. If the Court has got to find out the object of the trust outside the trust-deed or if it is left to the trustees appointed by the deed to determine what the object of the trust should be, the object determined by the Court or by the trustees cannot be regarded, by any stretch of imagination, as the object of the trust as created by the author and a Court enforcing the administration of the trust for such an object cannot be said to be securing the administration of the trust as created by the founder, but will, in effect and in substance, be creating a trust in his name and on his behalf which the law does not seem to contemplate. If I am right in my interpretation of the implication of the Privy Council judgment, there is little doubt that the principle underlying that judgment is clearly applicable to the present case and the trust sought to be created by Ex. P-1 cannot but be held to be void for vagueness and uncertainty.

[15] It was next urged by the learned counsel for the appellants that the words "for other charitable purpose" as occurring in the deed must be construed to mean other charitable purpose *ejusdem generis* with what precedes those words, namely, advancement of medical aid to human beings and it was contended that construed in that way the object of the trust was definite enough and could not be considered to be vague or uncertain. This contention of the learned counsel, however, overlooks the concluding words of Cl. (2) of the deed of trust. According to these words, the trustees were given an absolute discretion in determining to what charitable purposes the income of the trust property was to be applied in case the same was not applied to the advancement of medical aid to human beings. According to the plain language of the deed, the trustees were not bound to apply such income to only such charitable purposes as were *ejusdem generis* with advance-

ment of medical aid to human beings and had a perfect right to select any other charitable purpose for applying such income.

[16] Amongst Hindus the words "charitable purpose" have such a diversity and variety of connotations that what one set of persons may regard as a charitable purpose may not be regarded as such by another set and may even be regarded as sinful by a third set. In the fold of Hinduism there are a very large number of sects taking diametrically opposite views as to what is and what is not meritorious or charitable. A trust by a Hindu, therefore, expressed to have been created for charitable purposes without any further attempt to define the purpose or object of the trust cannot but be regarded as vague and uncertain.

[17] I am accordingly of the opinion that the trust purporting to have been created by means of Ex. p-1 must be held to be void and unenforceable on account of vagueness and uncertainty of the object of the trust. In this view of the case, it does not appear to be necessary to enter into any discussion of the other ground on which the trust has been held to be invalid by the learned trial Judge. I must, however, say that the decision of the learned Subordinate Judge on that subject also does not appear to be open to any serious criticism. Even assuming that Madho Parshad and Khushi Ram had ceased to be members of a joint Hindu family before the execution of Ex. p-1, and that the actual disruption of the family had preceded and did not synchronize with the execution of the aforesaid deed, the only effect of such disruption could be to split up the family into two units, each unit constituting a joint Hindu family in itself. In spite of the separation between themselves, Madho Parshad and Khushi Ram continued to be members of joint Hindu families with their own son or sons and such son or sons had, therefore, an undoubted right to object to any disposition of the joint family properties by them on the ground of its being prejudicial to their interests as coparceners. As pointed out by the learned trial Judge, the properties which formed the subject-matter of the trust were obviously of much greater value than the properties that were left with each of the two units on partition and, therefore, the creation of the trust could not but be regarded as prejudicial to the interests of Ram Kishan defendant 1 in so far as the trust created by Madho Parshad was concerned and to the interests of Om Parkash and Hari Parkash defendants 3 and 4 in so far as the creation of the trust by their father Khushi Ram was concerned.

[18] If the trust-deed Ex. p-1, is once eliminated from consideration and the trust purporting to have been created thereby is held to be invalid

and unenforceable, I cannot see how the plaintiffs can be said to have any *locus standi* to maintain a suit for a declaration that the properties in Kanod and Moga are trust properties and had been dedicated by Madho Parshad and Khushi Ram or by Sham Lal and Mani Ram to charitable purposes. In order to have such a *locus standi* they must have an interest in the subject-matter of the trust. The plaintiffs claimed an interest in the subject-matter of the present suit as the collaterals of the founders of the trust and also as members of the Marwari community for whose benefit the trust was alleged to have been created. It has been held, and that finding was not contested before us in appeal, that the plaintiffs have failed to prove their alleged collateral relationship with the alleged founders of the trust. It has further not been found that the trust was created for the benefit of the Marwari community. There is no evidence at all that it was created for that purpose. The learned trial Judge has held that the plaintiffs have a *locus standi* to sue on the ground that they were Hindu residents of Delhi and as such interested in the subject-matter of the trust. According to the provisions contained in the trust-deed Ex. p-1, the bulk of the income of the trust property indeed if not the whole of such income, was to be spent for the establishment and maintenance of a college or school in Delhi. If that trust had not been held to be void, the plaintiffs could certainly claim that as Hindus residing in Delhi they were interested in the subject-matter of the trust because the trust had been created and was to be administered for the benefit generally of Delhi Hindus. If however, the trust-deed is left out of account and the plaintiffs seek to establish a dedication of the properties in suit to charitable purposes independently of the deed, they, merely as Hindu residents of Delhi, cannot claim to have any interest in the Chhetar at Kanod or the shop in Moga Mandi of which the income it is alleged, was being used for the maintenance of the said Chhetar. It is well-settled that in order to be entitled to maintain a suit for the preservation of or for any other relief respecting trust property, the plaintiff must show that he has got an interest which is more than a purely sentimental interest in the subject-matter of the trust. While as Hindu residents of Delhi the plaintiffs may claim such an interest in the Dharamsala situate in Delhi and the bathing ghat which is also situate in the same place, they cannot be said to have such an interest in the Chhetar at Kanod or the property the income whereof was being used for the maintenance of that Chhetar. I am accordingly of the opinion that the plaintiffs had no *locus standi* to maintain the suit in so far as the property in Kanod

and Moga is concerned. Their suit in respect of those properties must, therefore, be held to have been rightly dismissed even without going into the question whether those properties were ever actually dedicated.

[19] The suit in respect of the property in Kanod was liable to dismissal on another ground as well, namely, want of jurisdiction in this Court to make any declaration in respect of property situate in Patiala State.

[20] The shares in Messrs. Raj Nath and Company have been rightly held not to have been proved to be dedicated to any religious or charitable purpose. The learned counsel for the appellants laid considerable stress on the fact that the money spent on the acquisition of these shares had come out of the dharmada khata. In the absence of any evidence and even of any suggestion that the money in the dharmada khata had been dedicated to any particular purpose that money could not be regarded as trust money. This the learned counsel for the appellants had to concede. I do not see how under these circumstances the mere fact of a part of that money having been used for the acquisition of the shares could make the shares trust property. The learned counsel for the appellants had to concede that if Ex. p-1 were eliminated from consideration and could not be enforced, it was not possible to tell what the object of the alleged dedication of the shares was. It was admitted that the shares or the income thereof did not appear to have been dedicated to any particular or specified purpose before the execution of Ex. p-1. Under these circumstances, I do not see how those shares can be held to be trust property or can be deemed to have been dedicated as such property. The utmost that can be said is that Madho Pershad and Khushi Ram intended to use the money which was held by them in the dharmada khata for charitable purposes and that they invested a part of that money in the acquisition of these shares of which the income was also intended to be used for some charitable purposes. However, neither the money in the dharmada khata nor the shares purchased with such money could be deemed to have become trust property till they were actually dedicated. Till such dedication, the title remained in the aforesaid Madho Parshad and Khushi Ram. I am, therefore, of the opinion that the plaintiffs' suit in respect of the shares has been rightly dismissed. I am not, however, able to endorse the finding of the learned trial Judge in respect of the bathing ghat. It was admitted by Mr. Bishambar Dial, the learned counsel for defendants 3 to 5 in the trial Court, that the aforesaid ghat had been used as a bathing ghat by the Hindu public. The ghat was admittedly

constructed in the year 1920 by Madho Parshad and Khushi Ram and an outsider who is said to have contributed one-half of the expenses. The ghat was constructed on the bank of the Jamna and it has never been suggested that the land on which it was constructed belonged to Madho Parshad and Khushi Ram or their joint families. Evidently it was public land. Whatever might have been the position, if the aforesaid Khushi Ram and Madho Parshad had constructed a bathing ghat on their private land and had allowed the Hindu public to use it for bathing purposes, the position is quite different in the present case. In the former case, it might be that in spite of the use by public or a section of the public of the ghat for the purpose of bathing, it continued the private property of the persons constructing the ghat subject to some kind of customary right in the public to use it for the purpose of bathing. In the present case, the ghat having been constructed on land which never belonged to Khushi Ram and Madho Parshad but which was public property, and having been used by the Hindu public generally as a bathing ghat, evidently without any permission being obtained from Madho Parshad and Khushi Ram, and to all appearances as of right, cannot be regarded as the private property of the aforesaid Khushi Ram and Madho Parshad or of the plaintiffs.

[21] For the reasons given above, I would allow the plaintiffs' appeal only to the extent of modifying the decree passed by the learned trial Judge in their favour by including in it a declaration to the effect that the bathing ghat in dispute is wakf or trust property and not the private property of the defendants. In all other respects, I would maintain the decree of the learned trial Judge.

[22] As regards the appeal of defendants 3 to 5, I feel no hesitation in saying that it is wholly devoid of force. It was admitted by their counsel in his statement recorded before the framing of the issues that the dharamsala had been built for public use and had in fact been so used. He, however, added that the same had not been actually dedicated. If it was built for use by the public and had been actually so used without any let or hindrance, it could not be held to be otherwise than property dedicated to use by the public although the act of actual formal dedication was not proved to have taken place. There is abundant evidence on the record to show that ever since its construction the dharamsala has been used as a public place by the Hindu public residing in that locality as of right and that travellers have been staying there without seeking any permission from anybody. In the previous litigation relating to this property it has been held to be

public or trust property. Indeed, in arguing the appeal the learned counsel for defendants 3 to 5 did not deny its being trust property. He simply contended, that it was not a public but a private trust. I, however, am unable to appreciate the distinction sought to be drawn between a private and a public trust in so far as a dharamsala admittedly used by the public generally for public purposes is concerned. One may have a private idol or a private temple in one's house and any endowment made for the maintenance of that temple or idol to which the public are not admitted as of right may be regarded as a private trust. The case of a dharamsala which by its nature is meant for use by the public is, however, different. Our attention was not drawn by the learned counsel to any decided case in which a dharamsala had been held to be a private trust.

[23] It was half-heartedly urged by the learned counsel for defendants 3 to 5 that the trial Court had erred in allowing expenses incurred by the trustees in the maintenance of the pathshala as valid charges on the income from dharamsala property. The contention is, however, wholly devoid of force. The pathshala was started by Madho Parshad and Khushi Ram in the dharamsala, has all along been regarded as a part of the dharamsala, and has throughout been maintained out of the income of the property attached to the dharamsala. The expenses on this pathshala incurred by the trustees during the period they remained in charge thereof have, therefore, been rightly allowed as a valid charge on the dharamsala income.

[24] It was also contended by the learned counsel for defendants 3 to 5 that the suit was barred by the provisions of S. 92, Civil P. C. and could not proceed in the absence of the sanction of the Advocate-General or of the Collector. The suit was evidently not one of the type of suits contemplated by S. 92. There was no allegation of breach of trust by any trustee and no relief was claimed against any trustee. The suit was merely for a declaration that the property which was claimed by the defendants to be their private property was not in fact so but was trust property. Such a suit does not fall within the purview of S. 92 and no sanction either of the Advocate-General or of the Collector was necessary to make it competent.

[25] For the reasons given above, I see no force in the appeal of defendants 3 to 5 and would dismiss the same. In the circumstances, I would leave the parties to bear their own costs in both the Courts.

[26] **Khosla J.** — I agree.

R.G.D.

Order accordingly.

A. I. R. (35) 1948 East Punjab 59 [C. N. 22.]

TEJA SINGH AND KHOSLA JJ.

Jwala Singh Sant Singh and another—Plaintiffs—Appellants v. The Province of Punjab—Defendant—Respondent.

Second Appeal No. 1067 of 1946, Decided on 18-3-1948, from decree of Dist. Judge, Ferozepore, D/-28-1-1946.

(a) Civil P. C. (1908), O. 6, R. 2—Case based on custom—Proof of—Party basing case on *wajib-ul-arz*—He can in appeal, rely on Manual of Customary Law—Custom (Punjab)—Pleadings—Civil P. C. (1908), O. 41, R. 1—Evidence Act (1872), S. 32 (4).

The Customary Law of the Punjab is an unwritten law and when a party relies upon a particular custom, he is required to prove it by evidence. The evidence may consist of instances in which the alleged custom was asserted or followed, or of public records, e. g. *wajib-ul-arz* and *riwaj-i-am*, containing the statement of the custom. Both *wajib-ul-arz* and *riwaj-i-am* are admissible to prove custom, though they are not conclusive. The presumption afforded by these may be rebutted. Similarly, Manuals of Customary Law are prepared in accordance with the *riwaj-i-am* and are issued by the authority of each district and stand on much the same footing as the *riwaj-i-am*.

The fact that a party relies on *wajib-ul-arz* to support the alleged custom and does not refer to Manual of Customary Law in his pleading, cannot prevent him from relying upon it at the appellate stage. 107 P. R. 1887; 1 A. I. R. 1914 P. C. 11; 14 A. I. R. 1927 P. C. 113; 15 A. I. R. 1928 P. C. 294; 31 A. I. R. 1944 P. C. 18 and 17 A. I. R. 1930 Lah. 900, *Rel. on.*

[Para 6 and 8]

Annotation :—('44 Com) Civil P. C., O. 6 R. 2 N. 9, O. 41 R. 1 N. 12.

Annotation :—('46-Man) Evidence Act, S. 32 N. 22.

(b) Custom (Punjab)—Succession—Johal Jats of village Dhaleke in District Ferozepore—Widow dying without heirs—Land goes to owners of *patti* in which it is situated and does not escheat to Government.

Among the Johal Jats, in village Dhaleke in Ferozepore District according to Question and Answer 63 of Currie's Manual of Customary Law of Ferozepore District of 1914, upon the death of a person intestate, leaving no heirs, his land, in the absence of any *thullas*, must go to the owners of the *patti* as if it were *shamilat* of the *patti*.

[Para 9]

Cases referred :—

1. ('87) 107 P. R. 1887, *Gujar v. Shamdas*.
2. ('15) 37 All. 129 : 1 A. I. R. 1914 P. C. 11 : 42 I. A. 10 : 28 I. C. 34 (P. C.), *Digambar Singh v. Ahmad Sayeed Khan*.
3. ('27) 49 All. 367 : 14 A. I. R. 1927 P. C. 113 : 54 I. A. 204 : 101 I. C. 368 (P. C.), *Sheo Baran Singh v. Mt. Kulsumunnissa*.
4. ('29) 10 Lah. 86 : 15 A. I. R. 1928 P. C. 294 : 55 I. A. 407 : 113 I. C. 1 (P. C.), *Mt. Vaishno Ditti v. Mt. Rameshri*.
5. ('16) 3 A. I. R. 1916 P. C. 129 : 44 Cal. 749 : 44 I. A. 89 : 45 P. R. 1917 : 38 I. C. 354 (P. C.).
6. ('25) 12 A. I. R. 1925 P. C. 267 : 6 Lah. 502 : 52 I. A. 379 : 91 I. C. 455 (P. C.).
7. ('44) 31 A. I. R. 1944 P. C. 18 : I. L. R. (1944) Lah. 195 : I. L. R. (1944) Kar. P. C. 66 : 71 I. A. 14 : 212 I. C. 117 (P. C.), *Saleh Mohammad Shah v. Zawar Hussain*.
8. ('30) 17 A. I. R. 1930 Lah. 900 : 129 I. C. 756, *Atta Mohammad v. Fateh Mohammad*.

M. L. Puri and S. L. Puri—for Appellants.

Bishan Narain—for Respondent.

Teja Singh J.—In order to be able to understand the point involved in this appeal it is necessary to set out briefly the facts. Mt. Sahib Kaur, widow of Budhu, a Johal Jat of village Dhaleke in the District of Ferozepore, died leaving behind her considerable area of land. The Sub-Divisional Officer, Moga, by his order dated 9th August 1932 mutated the entire land in favour of the proprietors of *Patti Chela*, in which the land was situate. Some of the proprietors of the *patti* appealed to the Collector alleging that they were the collaterals of Mt. Sahib Kaur's husband and consequently they were entitled to the land in preference to the other owners of the *patti*. The Collector rejected the appeal, but by his order of 23rd January 1933 directed that the land be mutated in favour of the Crown. His reasons for doing so were that Mt. Sahib Kaur had not left any legal heirs and so the land which stood in her name must escheat to the Crown.

[2] The suit out of which this appeal has arisen was instituted by Jowala Singh and Bishen Singh, two of the Johal Jat proprietors of *Patti Chela* on 22nd March 1945. It was a suit in a representative capacity and the plaintiffs prayed for permission to conduct it on behalf of all the Johal Jat proprietors of the *patti*. The permission was duly granted. The allegations of the plaintiffs were that they were entitled to succeed to the suit land on Mt. Sahib Kaur's death, first because they were the collaterals of her husband and secondly because they were the descendants of the original founder of the *patti* in which the land was situate. In the alternative they alleged that even if Mt. Sahib Kaur should be taken to have died heirless, the land could not escheat to the Crown and according to custom it must go to the *patti* and be divided among all the persons on whose behalf the plaintiffs were suing, because they were the proprietors of the *patti*. The defendant denied the plaintiffs' right and resisted the suit also on the ground of limitation. The trial Court framed the following two issues:

(1) Whether the plaintiffs were dispossessed of the suit land within 12 years of the suit and whether the suit is within time?

(2) In case the above issue is found for the plaintiffs whether the plaintiffs are the heirs of Mt. Sahib Kaur?

It also framed a third issue regarding the relief.

[3] The first issue was left undecided, but the plaintiffs' suit was dismissed with costs, because the trial Court came to the conclusion that the plaintiffs had not been able to prove the second issue.

[4] The plaintiffs preferred an appeal to the Court of the District Judge from the decree of the trial Court. It appears that the counsel who argued the appeal on their behalf confined himself to the question of custom and in order to substantiate his contention that when a person dies without leaving any heirs his land goes to the owners of the *patti* in which it is situated, he cited the Manual of Customary Law of the District compiled in 1914. The District Judge, however, refused to allow the counsel to refer to the Customary Law on the ground that it had not been relied upon in the Court below and disallowed the appeal. The plaintiffs have now come to this Court in second appeal.

[5] The exact words used by the learned District Judge are as follows:

"In arguments in appeal the learned counsel for the appellants attempted to rely on Question No. 63 of Currie's Customary Law of the Ferozepore District prepared in 1914. As pointed out by the learned Sub-Judge, however, in the lower Court the plaintiffs did not rely on the Customary Law of the District, their claim being on the contrary based on the *wajib-ul-arz* and the statement of the proprietors in the *Teht Shijra*. This being so, the appellants cannot be permitted at the appellate stage to put forward what amounts to fresh pleadings and their case must stand or fall on the pleadings themselves and the evidence produced in support thereof. As no copy of the documents relied on was produced, the plaintiffs' case on this point must fail."

[6] The learned District Judge made a fundamental mistake in thinking that the plaintiffs' suit was based upon the *wajib-ul-arz* and the statement of the proprietors appearing under the pedigree-table, whereas the basis of the suit was custom and the two documents mentioned above were referred to as evidence of the custom. It must be remembered that Customary Law of the Punjab is an unwritten law and when a party relies upon a particular custom, he is required to prove it by evidence. The evidence may consist of instances in which the alleged custom was asserted or followed, or of public records, e. g. *wajib-ul-arz* and *riwaj-i-am*, containing the statement of the custom. As regards the preparation of the public records and the value of the statement of custom contained therein, reference is invited to the observations made by Roe J. in 107 P. R. 1887.¹ After pointing out that the Punjab Civil Code was the first attempt under British rule to publicly expound the Customary law, he observed as follows:

"The next exponents of custom were the Settlement Officers, who made the first Records of Rights, which include the *Wajib-ul-Arz*, which is intended to be the exponent of village custom. These records were prepared after such careful enquiry that, by the Punjab Land Revenue Act, entries in them have a legal presumption of truth. . . ."

Then the learned Judge said:

"Some thirty years have passed since these first

records of custom were prepared, and at the revised Settlements, the Customary law has been embodied, not in a *Wajib-ul-Arz* having a technical value under the Land Revenue Act, but in a general record of custom, called the *Riwaj-i-Am*. These records contain the answers of the leading men, of all the *Lambardars*, and of any others who choose to attend of the various tribes residing within a convenient distance of the place of assembly. The recorded opinions of these men are admissible under S. 32 (4), Evidence Act, . . ."

[7] In several appeals from Allahabad and Oudh their Lordships of the Privy Council held that the statement of a custom recorded in a *wajib-ul-arz* of a village is good *prima facie* evidence of the custom without corroborative evidence of instances in which it has been exercised: see *inter alia* 37 ALL. 129² and 49 ALL. 367.³ The ratio decidendi of these decisions is equally applicable to the case of a *riwaj-i-am* in the Punjab which is somewhat a similar document. Moreover, though in early times the *wajib-ul-arz* in the Punjab contained a statement of the custom, this is no longer the case and the custom is now recorded in the *riwaj-i-am* of the Tehsil and District. In 10 Lah. 86⁴ Sir John Wallis, who delivered the judgment of the Judicial Committee, made the following observations regarding the value to be attached to the Manuals of Customary Law that are prepared for every District under the orders of the Government:

" . . . it has been rightly held in the Lahore Court in the case above mentioned that, where a custom is alleged a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and the Local Government has come to their assistance by establishing a *Riwaj-i-Am* or record of custom in the different parts of the Punjab, including the North West Frontier Province which was formerly included in it. It has been held by this Board that the *Riwaj-i-Am* is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal; and that the statements therein may be accepted, even if unsupported by instances: *Eeg v. Allah Ditta*⁵ and *Ahmad Khan v. Mt. Channi Bibi*.⁶

Later on his Lordship observed:

"Further, manuals of customary law in accordance with the *Riwaj-i-Am*, have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the *Riwaj-i-Am* itself as evidence of custom."

[8] In A. I. R. 1944 P. C. 18,⁷ which was a case from Jhang District, their Lordships of the Privy Council remarked that the Manual of Customary Law was *prima facie* to be regarded as the most accurate and fully considered statement of the long-standing custom. Since these manuals are now available for citation, the fact that a party does not refer to them either in his pleadings or in the list of documents relied upon cannot prevent him from relying upon them at the time of arguments. It is of course correct that the evidence of custom so afforded by the *riwaj-i-*

am is well as by the Manual of Customary Law is not conclusive and it is always open to the other side to rebut it, and if a party's case be that since the Customary Law was not relied upon at the proper time, he has been taken by surprise and he should therefore be given an opportunity of producing evidence in rebuttal, the Court will consider the request on its merits. But the reason why the learned District Judge disallowed the production of Customary Law in this case was altogether different and was, in my opinion, wrong. In A.I.R. 1930 Lah. 900⁸ it was held that where a reference is made to the Manual of Customary Law for the purpose of proving a custom, the mere absence of copy of *raiwaj-i-am* on the record was immaterial.

[9] Now the Question and Answer 63 of Currie's Manual of Customary Law of the Ferozepore District of 1914 read as follows:

"Question — Enumerate in the order of their succession the persons entitled to the estate of a man who dies intestate, leaving no relations?

Answer — The property will first become *shamilat thulla*; if there are no *thullas*, *shamitat patti*; if there are no *pattis*, *shamilat deh*."

It was not alleged in this case that there were any *thullas* in the village. Accordingly the suit land must go to the *patti* and must be divided between the owners of the *patti* as if it were *shamilat* of the *patti*. Mr. Bishen Narain, learned counsel for the respondent, contended that there were other owners of the *patti* than the Johal Jats, on behalf of whom the plaintiffs instituted the suit. But no such defence was raised in the trial Court and this being a question of fact I do not think it can be allowed to be raised at this stage. My opinion therefore is that the plaintiffs and the persons on whose behalf they sued were entitled to succeed to the land in accordance with the custom.

[10] Now as regards the question of limitation. The plaintiffs' case was that they were dispossessed within twelve years of the date of the suit. There was no definite evidence on this point, but taking into consideration the fact that the mutation in favour of the Crown was sanctioned by the Collector on 23rd January 1933 and before that the land stood in the name, and was in possession, of the plaintiffs, their dispossession could have taken place only after 23rd January 1933. It is in evidence that the plaintiffs gave a notice to the Deputy Commissioner under S. 80, Civil P. C., on 20th January 1945 and the law is that they were entitled to deduct two months on account of the notice from the period of limitation. Accordingly the suit which was instituted on 22nd March 1945 is within time.

[11] In the result I would allow the appeal, set aside the judgments and the decrees of the

Courts below and grant the plaintiffs a decree for possession of the suit land with costs throughout.

[12] Khosla J.—I agree.
K.S.

Appeal allowed.

A. I. R. (35) 1948 East Punjab 61 [C.N 23.]
TEJA SINGH J.

The Governor-General in Council—Defendant—Petitioner v. Bhagwan Sahai—Plaintiff—Respondent.

Civil Revn. No. 661 of 1946, Decided on 15-12-1947, to revise decree of Sm. C.C. Judge, Delhi, D/- 31-7-1946.

(a) Civil P. C. (1908), O. 3, R. 1 — Recognised agent can examine and cross-examine witnesses though he cannot "plead."

Though it is true that a recognised agent appointed under O. 3, R. 2, stands on a different footing from a pleader duly authorised and appointed to conduct a case and that a pleader in so far as the conduct of the case is concerned, possesses more rights than the recognised agent of a party, it does not follow therefrom that because the pleader possesses the right to cross-examine witnesses produced by the opposite side and lead the evidence of his own side, a recognised agent must be denied these rights for this reason alone.

"Pleading" stands on a different footing from "acting." "Acting" includes examination of witnesses but not pleading. Hence a recognised agent can cross-examine the witnesses for the other side and then examine the witnesses of his principal: *Case law distinguished.*

[Paras 3, 5 and 9]

Annotation: ('44-Com.) Civil P. C., O. 3, R. 1, N. 3.

(b) Civil P. C. (1908), O. 3, R. 2(a)—Suit against State Railway.—Litigation Inspector holding power of attorney from General Manager of Railway authorizing him to conduct case was held to be recognised agent of the defendant. [Para 5]

Cases referred:—

1. ('34) 21 A. I. R. 1934 Cal. 563 : 61 Cal. 324 : 151 I. C. 753, *In re Eastern Tavoy Minerals Corporation Ltd.*
2. ('37) 24 A. I. R. 1937 Mad. 937 : I. L. R. (1938) Mad. 12 : 172 I. C. 489 (F. B.), *Thayarammal v. Kuppuswami Naidu.*
3. ('16) 3 A. I. R. 1916 Cal. 181 : 28 I. C. 838, *Harchand Ray v. B. N. Ry. Co.*
4. ('36) 23 A. I. R. 1936 Oudh 261 : 12 Luck. 123 : 161 I. C. 538, *Jaivanlal v. Ram Ratan.*
5. ('38) 25 A. I. R. 1938 Lah. 698 : I. L. R. (1938) Lah. 417 : 179 I. C. 755, *Bashir Ahmad v. Mrs. Mary Minck.*

Niranjan Singh—for Petitioner.

Bhagwat Dyal—for Respondent.

Order. — This revision petition is directed against the decree of the Judge of Small Cause Court, Delhi. The plaintiff in the case, belongs to Delhi. He brought a suit for recovery of Rs. 316.11.0 against the Governor General in Council on the allegations that he was the consignee of the two bags of brass cocks that were despatched through the North Western Railway from Rahwali to Delhi on 6th August 1944 and since the bags were not delivered to him by the Railway and were lost by them he was entitled to the price of the cocks together with profits that he could have made out of them. The

defendant resisted the suit on various grounds. He denied that the plaintiff was the consignee of the bags in question or that he had any *locus standi* to maintain the action. He also denied that any valid notice had been given under S. 80, Civil P. C., or that the suit was within time. Last of all he denied that the plaintiff was entitled to recover anything from him. The issues framed by the trial Court read as follows:

- (1) Is the suit within limitation?
- (2) Did plaintiff serve the defendant with a valid notice under S. 80, Civil P. C.?
- (3) Has plaintiff a *locus standi* to sue?
- (4) Is defendant not liable to pay the price of the missing consignment? and
- (5) To what amount is the plaintiff entitled?

The first four issues were found for the plaintiff. As regards the last issue, the Court came to the conclusion that the plaintiff was entitled only to recover from the defendant the price of the cocks which was Rs. 255 and accordingly decreed the suit to that extent. The defendant has now put in this revision petition against the decree.

[2] The first point raised by Mr. Naranjan Singh Keer on behalf of the petitioner was, that the defendant was not allowed sufficient opportunity to conduct his case in the Court below. Now what happened was that a Litigation Inspector of the North Western Railway appeared in the lower Court to conduct the case on behalf of the defendant. He held a regular power of attorney from the General Manager of the North Western Railway authorising him *inter alia* to appear on behalf of the defendant, to represent him in the proceedings and to do everything for the conduct of the case. When the case came to the evidence stage and the Inspector wanted to cross-examine the witnesses produced by the plaintiff the Judge of the Court below did not allow him to do so. He even did not permit the Inspector to examine the witnesses whom the defendant wished to produce with a view to rebut the plaintiff's evidence. It appears that he first passed oral orders disallowing the Litigation Inspector from examining and cross-examining the witnesses. Later on the Litigation Inspector put in an application. On this he made a formal order on 31st July 1946. After referring to his oral orders he stated as follows:

"There are numerous rulings to the effect that there is no warrant whatever for putting a power-of-attorney given to a recognised agent to conduct proceedings in Court in the same category as a Vakalatnama given to a legal practitioner. The latter power-of-attorney or appointment is confined only to pleaders, that is those who have right to plead in Courts. The Litigation Inspector cannot be allowed to conduct the proceedings in the same way as a recognised pleader. He has got no right of audience on behalf of the defendant and nor is he entitled to plead on behalf of the defendant."

[3] As regards the first part of the above

order it is quite correct that a recognised agent appointed under O. 3, R. 2, Civil P. C., stands on a different footing from a pleader duly authorised and appointed to conduct a case. It is also true that a pleader in so far as the conduct of the case is concerned, possesses more rights than the recognised agent of a party, but it does not follow therefrom that because the pleader possesses the right to cross-examine witnesses produced by the opposite side and lead the evidence of his own side, a recognised agent must be denied these rights for this reason alone.

[4] So far as the second part is concerned, it appears to me that the learned Judge of the Court below did not apply the law correctly. It is laid down in R. 1, O. 3, Civil P. C., that any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader, (appearing, applying or acting, as the case may be) on his behalf. Rule 2 refers to recognised agents and lays down that such agents by whom appearances, applications and acts mentioned in Rule 1 may be made or done are:

(a) person holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance etc., is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearance, etc.

Rule 5 deals with the appointment of pleaders.

[5] There can be no doubt that the case of the Litigation Inspector falls within the ambit of cl. (a) of R. 2 and since he held a proper power-of-attorney he was the recognised agent of the defendant and accordingly by virtue of R. 1 he had the same right of putting in appearance in the case or making applications or acting as the defendant himself had. Counsel for the respondent contended that 'acting' does not include the right to examine and cross-examine witnesses and in order to support this contention of his the respondent's counsel referred me to a number of cases.

[6] A. I. R. 1934 Cal. 563¹ was a case on the original side of the High Court. One of the Directors of the Company, who was a party to the case, claimed the right of audience on behalf of the company by virtue of a power-of-attorney. The other side objected. The learned Judge upheld the objection and observed that to plead was not to make or do an appearance, or an

application or an act, and was not within O. 3, Rule 1.

[7] In A.I.R. 1937 Mad. 937² the following was one of the three questions referred to the Full Bench :

Whether an agent with a power-of-attorney to appear and conduct judicial proceedings has the right of audience in Court."

The question was answered in the negative and Beasley C. J. who delivered the judgment of the Full Bench after referring to an unreported case of this Court and A. I. R. 1916 Cal. 181³ and 61 Cal. 324¹ made the following observations :

"It is plain from these three cases that Rr. 1 and 2 of O. 3, Civil P. C., do not give the recognised agent any right to plead in Court on behalf of his principal either in the appellate or Original Sides of the High Court and, even if it could be contended successfully that O. 3 gives a right to a recognised agent to plead in Court on the appellate side, it is clear that he can have no such right of audience on the Original Side because of S. 119 which provides that :

"Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its Charter authorised him to do, etc." (Section 119 appears in Part 9, Civil P. C., which lays down special provisions relating to the Chartered High Courts.)

[8] In A.I.R. 1936 Oudh 261⁴ one of the appellants applied that his special agent be allowed to argue the appeal on his behalf. The learned Judges rejected the application and held that the words of O. 3 R. 1, Civil P. C., viz. 'any appearance, application, or act' meant no more than that the recognised agent could appear, make applications and take such steps as might be necessary in course of the litigation for the purposes of the case of his principal being properly laid before the Court and that they could not justify a recognised agent being allowed to argue and plead.

[9] In A.I.R. 1938 Lah. 698⁵ the question was whether a pleader who has not been regularly appointed by a document in writing signed by a party or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment, as required by R. 4 (1) of O. 3 could make an application on his behalf. The words of the sub-rule are, that no pleader shall act for any person unless he has been appointed for the purpose by such person by a document in writing signed by him or by his recognised agent, etc. It was held that the pleader had no right to make the application. The learned Judges remarked :

"It is true that, while R. 1 of O. 3 mentions three functions of a pleader, viz. 'appearing, 'applying' or 'acting', sub-rule (1) and sub-rule (5) of R. 4 merely deal with 'acting' and 'pleading' respectively ; but that does not indicate that 'applying' is not covered by 'acting'. 'To apply' is to do something more than 'to

appear' or 'to plead'. It is to take some active step on behalf of a person and thus to act for him. 'Applying' therefore is included in 'acting' and this is why no separate provision has been made by the Legislature in relation to this function of a pleader. To hold otherwise would lead to absurd results. Rule 4 of O. 3 being silent on the point of applying, any pleader without any authority from a litigant and without putting in any memorandum of appearance would be in a position to present any application on his behalf. This obviously could not be the intention of the Legislature. It is a recognised principle of law that statutes should be interpreted in a reasonable manner so as to avoid all absurd interpretations, and the only reasonable interpretation in these circumstances is the one that we propose to put on the Rule."

It will thus be seen that all that was held in the cases other than the Lahore case, was that 'pleading' is quite different from 'acting' and since the law allows a recognised agent to act, he has no right to plead on behalf of his principal. In the case before me, there was no question of pleading. What the recognised agent merely wanted to was to cross-examine the witnesses for the other side and then to examine the witnesses of his principal and I find it difficult to hold that this was tantamount to pleading. The Lahore case does not help the respondent either. On the other hand it helps the petitioner inasmuch as it was held therein that the term 'acting' was wide enough to include 'applying'. By applying the analogy I am inclined to think that it should also include all acts which one is expected to take for the proper conduct of the case. The reasons why 'pleading' stands on a different footing from 'acting' are given in the cases mentioned above and the most important of them is that it is regarded as a special privilege of pleaders and the intention of the Legislature appears to be that they should not be usurped by private persons. No such considerations can apply in case of the right to cross-examine or examine witnesses. I, therefore, hold that the Judge of the Court below acted wrongly in not permitting the Litigation Inspector of the North Western Railway to cross-examine and examine the witnesses.

[10] In the view, that I take the natural course for me was to send back the case for retrial with the direction that the petitioner be allowed to cross-examine the plaintiff's witnesses and to lead his own evidence in defence. But after hearing the petitioner's counsel on some of the other points my opinion is that there will be no use in doing so. As I have already mentioned one of the pleas raised by the petitioner was that the plaintiff had no *locus standi* to bring the suit. The trial Judge decided this point in the plaintiff's favour. While doing so he appears to have ignored the stand taken by the plaintiff in his plaint. He states in his order :

"The plaintiff was the consignee of the goods and

had purchased it from the consignor for Rs. 255. There is no evidence in rebuttal."

Now the fact that the plaintiff bought the goods from the consignor is mentioned in the plaintiff's statement, but this is not what he alleged in the plaint. All that was stated in the plaint was, that the plaintiff was the consignee of the goods and no evidence at all was examined to prove that the goods were ever assigned to him. The respondent's counsel argued that the plaintiff, while he was in the witness-box, made a positive statement that the consignor endorsed the railway receipt in his favour, but the Judge did not record it, because the case being of the nature of small cause he was not bound to take down every word that the witnesses stated. In the first place there being no affidavit to support the counsel's contention I cannot take any notice of it. But even if what is urged before me be true, the plaintiff's oral statement on the point could not in law prove the endorsement, because it had to be in writing and the only evidence admissible to prove it was the writing itself. It is significant that the railway receipt bearing the endorsement was never produced in Court and there is no explanation whatever why this was not done. Accordingly, I find that the plaintiff has failed to prove that he was the consignee of the goods and consequently he had no *locus standi* to sue for the price thereof.

[11] The learned counsel for the petitioner also addressed arguments to show that the suit was barred by time and the requirements of law relating to notice have not been complied with. I do not consider it necessary to go into these points, because the suit must fail on the question of the *locus standi*. The result is that the petition is allowed and the plaintiff's suit is dismissed with costs throughout.

R.G.D.

Revision allowed.

A.I.R. (35) 1948 East Punjab 64 [C. N. 24.]

TEJA SINGH AND KHOSLA JJ.

Surat Singh and others — Plaintiffs — Appellants v. Mt. Lachhman Kaur and another — Defendants — Respondents.

First Appeal No. 365 of 1945, Decided on 19th April 1948, from decree of Sub-Judge, First Class, Amritsar D/- 13th July 1945.

Customary law (Punjab) — Alienation — Gift by widow — Collateral, when can challenge — Principle of representation — Applicability to female heirs — Gift of non-ancestral property to great grand-daughter of last male holder — Donee excludes other collaterals.

Under Customary law in the Punjab the gift by a female in favour of a total stranger can be challenged by collaterals, whether the property is ancestral or non-ancestral, and in such a case, the plaintiff need not

take the alternative plea that the gift is liable to be set aside even if the land is non-ancestral. A female holder has only a limited interest in property inherited by her and any alienation made by her in favour of strangers is liable to be challenged not only by the collaterals but even by the Crown in some cases. On the other hand, where the gift is made in favour of the descendants of the last male holder the question will arise whether the donee is to be preferred to the collaterals or not, and this will depend on whether the land is ancestral or self-acquired, and also on whether there is a special custom governing the succession, and in such cases the plaintiffs must allege the custom relied upon by them and if there is no allegation to that effect, the suit of the plaintiffs must be dismissed. [Para 10]

The principle of representation is recognized by Customary law. Females are also recognized as heirs representing the descendants of the deceased and as far as the descendants of the last male holder are concerned sex is no bar to representation, at any rate, up to the third degree. [Para 14]

Where, therefore, the donee of a gift of non-ancestral property by a widow is the great grand-daughter of the last male holder, she excludes all other collaterals unless they specifically allege and succeed in proving a special custom whereby they are to be treated as preferential heirs : *Case law discussed.* [Para 14]

Cases referred :—

1. ('38) 25 A. I. R. 1938 Lah. 299 : 175 I. C. 87 (F.B.), *Kishan Singh v. Mt. Santi.*
2. L. P. A. No. 14 of 1943 (Lah.), *Kanda v. Waghu.*
3. ('31) 133 I. C. 880 : 18 A. I. R. 1931 Lah. 609, *Rahmat Ali v. Ahmad Bakhsh.*
4. ('93) 127 P. R. 1893, *Mt. Fatima Bibi v. Gul.*
5. ('28) 9 Lah. 180 : 15 A. I. R. 1928 Lah. 291 : 109 I. C. 255, *Inayat v. Mt. Bharai.*
6. ('25) 12 A. I. R. 1925 P. C. 99 : 6 Lah. 117 : 52 I. A. 172 : 88 I. C. 114 (P. O.), *Hashmat Ali v. Mt. Nasib-ul-Nisa.*
7. ('21) 8 A. I. R. 1921 Lah. 321 : 62 I. C. 740, *Mt. Ahmadi-ul-Nissa v. Mt. Nasib-ul-Nisa.*
8. ('41) I. L. R. (1941) 22 Lah. 692 : 28 A. I. R. 1941 Lah. 94 : 193 I. C. 404, *Sanata v. Mt. Sahib Bibi.*

Shamair Chand and Harbans Singh Doabia —

for Appellants.
Kundan Lal Gosain, Amar Nath Sharma and S. Jhanda Singh — for Respondents.

Khosla J.—This appeal arises out of a suit by the collaterals of Deva Singh; deceased, for a declaration to the effect that an alienation by way of gift effected by Deva Singh's widowed grand daughter-in-law is not binding upon them. The gift was made in favour of Deva Singh's grandson's daughter. Deva Singh left a widow Mt. Nand Kaur upon whom his property devolved. Deva Singh had a son Budha Singh who predeceased him. Budha Singh's son Wasawa Singh also predeceased him. Wasawa Singh left a widow Mt. Lachhman Kaur and a daughter Mt. Kartar Kaur.

Deva Singh = Mt. Nand Kaur

|
Budha Singh

|
Wasawa Singh = Mt. Lachhman Kaur

|
Mt. Kartar Kaur (daughter).

After Mt. Nand Kaur, Wasawa Singh's widow Mt. Lachhman Kaur succeeded to the property

and she made a gift of it to her daughter Mt. Kartar Kaur. It is this gift which is the subject-matter of the dispute in the present litigation.

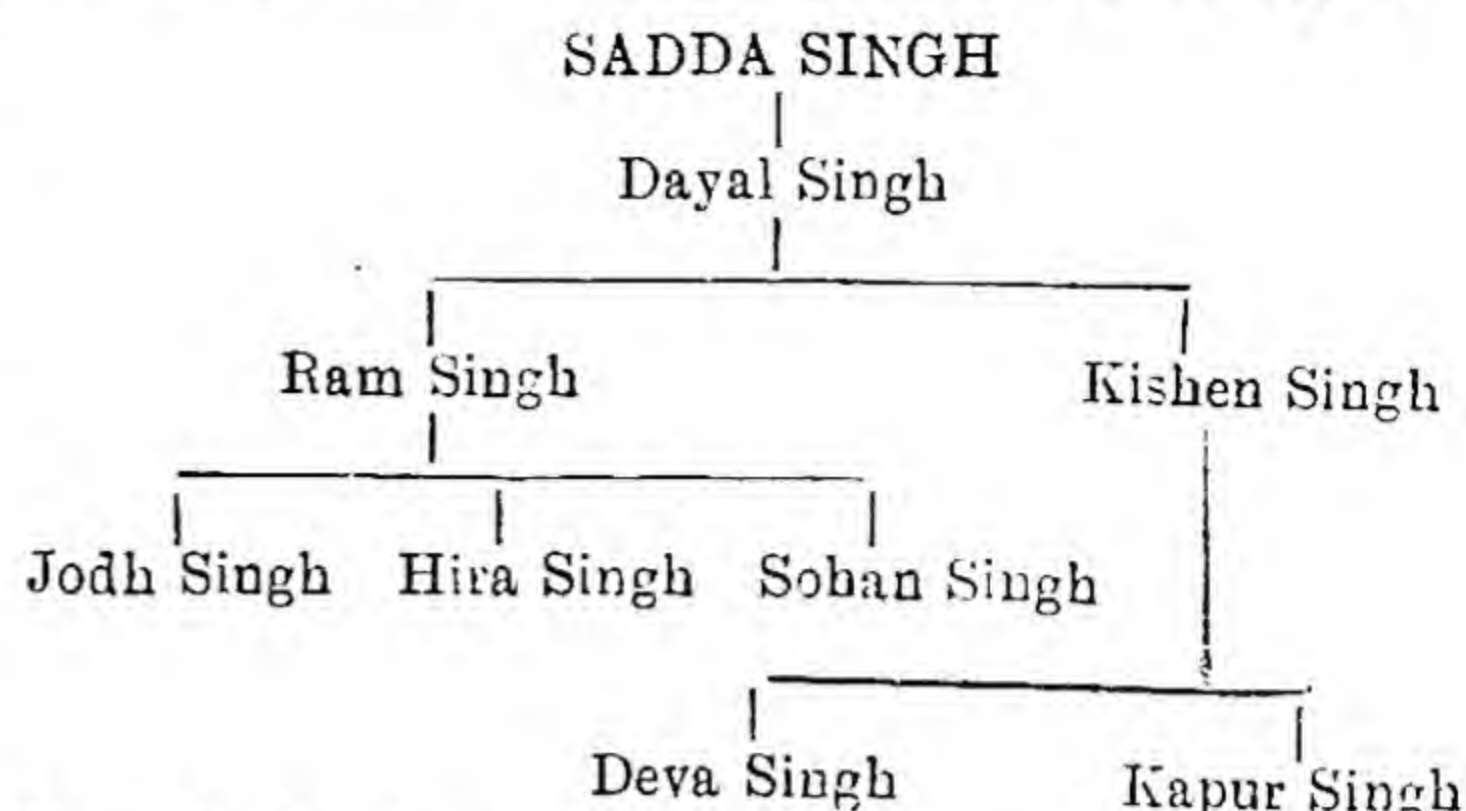
[2] The property in dispute is situated in two villages, namely Rakh Devi Das Pura and Chhapa in the District of Amritsar. The defence of Mt. Kartar Kaur was that the plaintiffs were not the collaterals of Deva Singh, that the property in dispute was not ancestral *qua* them and that, therefore, Mt. Lachhman Kaur defendant 1, the donor, had acquired full rights of ownership in the property. She was, therefore, competent to gift it to her daughter Mt. Kartar Kaur. It was further pleaded that the gift amounted to acceleration of succession and the plaintiffs were, therefore, not competent to challenge it. I may emphasise at this stage that the only ground on which the plaintiffs came to Court was that the land in dispute was ancestral *qua* them and that the gift could not affect their reversionary rights. There was no alternative plea that the suit was competent even if the land was found to be non-ancestral. The trial Court framed the following issues :

(1) Whether the plaintiffs are the collaterals of Deva Singh deceased ? (2) Whether defendant 1 got the property in dispute as full owner ? (3) If issue 2 is decided against the defendant, is the land in dispute ancestral *qua* the plaintiffs ? (4) Whether the gifts in favour of defendant 2 are valid against the plaintiffs ? (5) Do the gifts in dispute tantamount to acceleration of succession ? (6) If issue Nos. 2 and 3 are decided in favour of the defendants, can the plaintiffs challenge the alienations ? (7) Relief.

[3] The learned trial Judge found issues Nos. 1, 4 and 5 in the affirmative, that is the plaintiffs were held to be collaterals of Deva Singh and the gifts effected by Mt. Lachhman Kaur in respect of the property left by Deva Singh in the two villages were upheld as valid and as amounting to acceleration of succession. Issues Nos. 2, 3 and 6 were answered in the negative. It was held that defendant 1, Mt. Lachhman Kaur, was not the full owner of the property, that the land was not ancestral *qua* the plaintiffs and that the plaintiffs were not entitled to challenge the alienations. In appeal only two points were urged by the learned counsel for the appellants, Mr. Shamair Chand. He argued in the first place that the property of village Chhapa was ancestral *qua* the plaintiffs and in the second place he argued that even if the property was held to be self-acquired the gift in favour of the last male holder Deva Singh's grand-son's daughter could not be upheld *vis-a-vis* the collaterals.

[4] The first point regarding the nature of the property may be disposed of in a few words. The following pedigree-table shows the manner in which the property devolved upon Deva Singh :

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Dayal Singh is the common ancestor of the parties. The plaintiffs represent the line of Ram Singh and are his descendants, Deva Singh, the last male holder, was the son of Kishan Singh. Therefore, if it is found that the property was once held by Dayal Singh, it must be held to be ancestral *qua* the plaintiffs.

[5] There is no dispute with regard to the property in Rakh Devi Das Pura. It is conceded that this property was never held by the common ancestor, Dayal Singh, and that, therefore, it must be treated as non-ancestral. With regard to the property in Chhapa, the position is that, in 1852, the property was held half by Kapur Singh and Deva Singh, sons of Kishan Singh, and half by Jodh Singh, Hira Singh and Sohan Singh, sons of Ram Singh. From this entry a presumption certainly arises that the property devolved upon the holders from their ancestors and that Dayal Singh must have held the property sometime previously. This presumption is, however, rebutted by two pieces of evidence. The first is Ex. p. 28, a copy of the *kafiyat shajra nasab* of this village prepared in 1865. This shows that the sons of Kishan Singh and Ram Singh purchased the land of Patti Sama. It is, therefore, clear that they acquired the land themselves and did not inherit it from their ancestors. The other piece of evidence is an entry in Sir Lopel Griffin's Chief and Families of Note in the Punjab. This entry appears at p. 524 of the book and shows that Dayal Singh was killed in a battle and his *jagir* was seized by the conqueror :

"His two sons, Kishan Singh and Ram Singh, were thus thrown upon the world as poor as their father when he commenced his career. They went into the Amritsar District in the village Chhapa, where their father had first settled on leaving his home."

This entry also supports the contents of the *kafiyat shajra nasab* and it is clear that the sons of Kishan Singh and Ram Singh acquired the property in dispute and did not inherit it from their common ancestor Dayal Singh. It is, therefore, clear that the property in village Chhapa also must be treated as non-ancestral property.

[6] The next question for consideration is whether the plaintiffs are entitled to challenge this gift

even when it is held that the property is self-acquired. Counsel for the respondents raised a preliminary objection and contended that the plaintiffs had based their suit on one ground only, namely, that the land in dispute was ancestral *qua* them. There was no alternative plea by them that they were entitled to succeed even if the land was held to be non-ancestral. Mr. Kundan Lal Gosain who appeared on behalf of the respondents relied upon two decisions of the Lahore High Court in A. I. R. 1938 Lah. 299¹ and L. P. A. NO. 14 of 1243.² Mr. Shamair Chand, on the other hand, contended that even in the absence of any alternative plea the plaintiffs were entitled to fall back upon the general Customary law whereby any alienation by a widow could be challenged by the collaterals irrespective of whether the property was ancestral or self-acquired. He relied upon 133 I. C. 880³ and 127 P. R. 1893.⁴ It is necessary to examine these cases in some detail.

[7] In A. I. R. 1938 Lah. 299¹ a gift was made by the widow of the last male holder in favour of her daughter. The collaterals in the fifth degree of the last male holder brought a suit challenging this alienation on the ground that the property gifted was ancestral *qua* them. It was found by the trial Court that the land had never been held by the common ancestor. The question then arose whether the daughter of the last male holder excludes collaterals in the fifth degree in succession to non-ancestral property. A Full Bench of the Lahore High Court held that on the pleadings of the parties the question really did not arise as the plaintiffs had come to Court on the basis of their right to ancestral property only. The judgment of the Full Bench contains the following observation :

"The position is that the custom which it was necessary for the plaintiffs to allege and prove, was not pleaded nor put in issue; the first issue having been found in favour of the defendants, the suit ought to have been dismissed."

It is clear that the Full Bench took the view that once the property has been proved to be non-ancestral the plaintiffs could only succeed if they proved a special custom whereby daughters were excluded by collaterals of the fifth degree. This special custom had not been pleaded by the plaintiffs in that case and the suit, therefore, must fail. Had the widow of the last male holder made the gift in favour of a stranger instead of making it in favour of her daughter the position would no doubt have been otherwise, because it is clear that under the Customary law the widow's powers of alienation are extremely restricted.

[8] In L. A. P. No. 14 of 1943² the widow of the last male holder made a gift of the property

in her possession in favour of Waghu, the son of a predeceased daughter of her deceased husband. The collaterals brought a suit on the ground that the property was ancestral. Therefore, the conflict in that case was between the collaterals and a predeceased daughter's son. The property was found to be non-ancestral. The District Judge before whom the case went in appeal framed a new issue to the following effect :

"The land in suit having been found to be non-ancestral, do the collaterals exclude the daughter's son, according to the custom of the parties and is the gift, therefore, invalid?"

A Division Bench of the Lahore High Court in considering this matter made the following observations :

"The plaintiffs had throughout founded their claim on the ground of the property being ancestral and challenged the competency of the widow too on that ground. Not once during the proceedings before the trial Court had they advanced any alternative plea that even if the land was found to be non-ancestral, the widow would still be incompetent to dispose of it, although the resistance was entirely offered on that basis."

These remarks might seem to imply that any alienation by a widow must be upheld where the collaterals do not rely upon the alternative plea of their succeeding even if the property is found to be non-ancestral. But it is clear that this was not the meaning of the learned Judges. They were merely considering the relative claims of the collaterals and the daughter of the predeceased son. They came to the conclusion that collaterals could only succeed in preference to the grand-daughter if they could prove any special custom to that effect. They had not even alleged such a special custom, let alone proving it, and their suit, therefore, could not succeed. This decision though apparently supporting the respondents' technical objection in reality does not.

[9] The ruling relied upon by the learned counsel for the appellants, 133 I. C. 880,³ arose out of a suit by the collaterals of one Madari to challenge an alienation made by Mt. Sultano, an unmarried daughter of Madari's son. The alienation was, therefore, made by the last male holder's son's daughter. The donee was apparently a stranger to the family. The collaterals had come to Court on the ground that the land was ancestral *qua* them. The suit was dismissed by the trial Court and the lower appellate Court solely on the ground that the land was not held by the common ancestor of Madari and the plaintiffs. A Division Bench of the Lahore High Court allowed the appeal and observed that the lower Courts had "misapprehended the definition of ancestral when applied to land in the hands of a female holder who has the usual limited interest in it." The gift was held to be ineffective against the rights of the reversioners. Therefore,

in that case, although there was no alternative plea founded upon the non-ancestral nature of the land, the Court decreed the plaintiffs' claim.

[10] In 127 P. R. 1893⁴ it was held that it was the duty of the Courts to determine what law applied, and whether Muslim or Customary law should be given effect to. In that case the plaintiffs claimed to inherit certain property in accordance with Muslim law, which law was alleged to be identical with the custom by which the parties to the suit were governed. The lower Courts found that the Muslim law did not apply and dismissed the suit. A Division Bench of the Punjab Chief Court held that the Courts should have applied Customary law. These two rulings, therefore, are not in conflict with the Full Bench decision in A. I. R. 1938 Lah. 299¹ and the decision in L. A. P. NO. 14 of 1943 (Lah.)² The position will appear to be this. Under Customary law the gift by a female in favour of a total stranger can be challenged by collaterals, whether the property is ancestral or non-ancestral, and in such a case the plaintiff need not take the alternative plea that the gift is liable to be set aside even if the land is non-ancestral. A female holder has only a limited interest in property inherited by her and any alienation made by her in favour of strangers is liable to be challenged not only by the collaterals but even by the Crown in some cases. On the other hand, where the gift is made in favour of the descendants of the last male holder the question will arise whether the donee is to be preferred to the collaterals or not, and this will depend on whether the land is ancestral or self-acquired, and also on whether there is a special custom governing the succession, and in such cases the plaintiffs must allege the custom relied upon and if there is no allegation to the effect the suit of the plaintiffs must be dismissed. In the present case, the alienation is not in favour of a stranger but in favour of a descendant of Deva Singh, and, therefore, the question will arise whether Mt. Kartar Kaur is to be preferred to Deva Singh's collaterals with regard to self-acquired property. The plaintiffs have not relied upon any special custom. Indeed, they have not even alleged that they are entitled to succeed in case the property is found to be non-ancestral. The plaintiffs, therefore, must be non-suited.

[11] The learned counsel for the appellants argued that Mt. Kartar Kaur, the donee, in the present case must be treated as a stranger and not as an heir of Deva Singh. There is, however, no force in this argument. Mt. Kartar Kaur is the daughter of the predeceased grandson of Deva Singh. She is, therefore, the descendant of Deva Singh's predeceased son Budha Singh, and by the principle of representation Mt. Kartar

Kaur is an heir of Deva Singh. The question whether she can be excluded by collaterals must depend on the particular custom obtaining in the family or tribe and such custom has not been alleged. Paragraph 25 of Rattigan's Digest of Customary Law sums up the position as follows :

"By virtue of the right of representation, whereby descendants in different degrees from a common ancestor succeed to the share which their immediate ancestor, if alive, would succeed to, and which presumably prevails amongst agriculturists, all collateral heirs succeed together and not to the exclusion of each other, whether they were associated with, or separated from, the deceased."

[12] The principle of representation as enunciated above has been recognised in a number of judicial decisions, of which the most important from the point of view of the present case is 9 Lah. 180.⁵ This case arose out of a gift by the widow of the last male holder in favour of the sons of the daughter of a predeceased son. The donees, therefore, were the great-grandsons of the last male holder. This gift was challenged by Inayat who was found to be a member of the same *got* as the last male holder. Tek Chand J. who wrote the main judgment in the case discussed the principle of representation and came to the conclusion that the daughter's sons of the predeceased son of the last male holder were to be preferred to the plaintiff. The following observations from his judgment may be quoted :

"This indicates that the right of representation is recognized to the fullest extent amongst the members of this tribe. This answer is in accord with the general agricultural custom of the Province which on the whole favours the right of the descendants of a predeceased person to succeed. I must, therefore, hold that the defendants (donees), who are the daughter's sons of Fattu, a predeceased son of Bakha, have under custom a decidedly superior claim to succeed to Bakha's property as against the plaintiff, who is, if at all, an agnate of a very remote degree."

The learned Judge went on to say:

"It may also be mentioned that according to the general agricultural custom a grand-daughter and her sons are more or less on the same footing as a daughter and her son as against distant collaterals."

[13] In A.I.R. 1925 P. C. 99⁶ and A. I. R. 1921 Lah. 321⁷ it was held that the daughter of a deceased uncle was an heir under Customary law. These two cases related to a family of Sayads in Rohtak District and the custom involved was peculiar to that family. In 22 Lah. 692⁸ it was held that a gift by a widow in favour of her daughter could not be challenged by collaterals when it was found that the land was non-ancestral. The judgment contains the following observation :

"Holding, therefore, that the plaintiffs have failed to discharge the onus that lay upon them of proving that under the Customary Law governing the parties, they were entitled to oust the daughter even in the case of non-ancestral land, we affirm the decision of the Court below and dismiss this appeal with costs."

[14] From the above discussion it follows that the principle of representation is recognized by Customary law. Females are also recognized as heirs representing the descendants of the deceased. Learned counsel for the respondents argued that in no case was sex a bar to representation. While I am not prepared to accept the full implications of this contention I have no doubt in my mind that as far as the descendants of the last male holder are concerned sex is no bar to representation, at any rate, up to the third degree. In 9 Lah. 180⁵ discussed above the great-grandsons of the last male holder were held to be heirs although a grand-daughter intervened. In the present case, the donee is the great-grand-daughter of the last male holder and her case does not appear to be different to the case of the donee in 9 Lah. 180.⁵ There are many cases of a daughter of a predeceased son or the son of a daughter succeeding. I would, therefore, hold that the donee Mt. Kartar Kaur cannot be excluded by the plaintiffs in the present case, unless they succeed in proving a special custom whereby they are to be treated as preferential heirs to the non-ancestral property of Deva Singh. They did not even allege such a custom and they did not put forward any plea based upon the non-ancestral nature of the property. They cannot, therefore, be entitled to argue that the alienation by Mt. Lachhman Kaur is liable to be set aside even if the property is found to be non-ancestral. The gift is not in favour of a stranger, and in the absence of proof of any special custom the plaintiffs' suit must fail. I would accordingly uphold the decision of the trial Court and dismiss the appeal, but would leave the parties to bear their own costs throughout.

Teja Singh J.—I agree.

D.R.R.

Appeal dismissed.

A. I. R. (35) 1948 East Punjab 68 [C.N. 25.]

TEJA SINGH AND KHOSLA JJ.

Shanti Lal — Plaintiff — Appellant v. Daulat Ram — Defendant — Respondent.

Second Appeal No. 1607 of 1946, Decided on 6-4-1948, from decree of Dist. Judge, Ferozepore, D/-20-5-1946.

Limitation Act (1908), S. 14 — "Defect of jurisdiction or other cause" — Dismissal of prior proceedings as barred by limitation—Dismissal is on merits and not from any "defect of jurisdiction or other cause."

When a Court dismisses a suit or an application on the ground that it is barred by time it decides it on merits. In any case, it cannot be said that it is unable to entertain it either from defect of jurisdiction or other cause of a like nature. Where, therefore, the previous proceedings, the time spent during which the plaintiff wishes to be excluded, were started on an application for execution and it was held that the execution application was barred by time, the case does

not fall under the purview of S. 14, Limitation Act, and the time spent therein cannot be excluded : 5 A. I. R. 1918 Mad. 23 and 26 Cal. 414 (F.B.), *Rel. on.* [Paras 6 and 10]

Annotation : ('42-Com.) Lim. Act, S. 14, N. 22, Pts. 1C, 7.

Cases referred :—

1. (1900) 22 All. 248, Mathura Singh v. Bhawani Singh.
2. ('35) 22 A. I. R. 1935 Lah. 736 : 156 I. C. 378, Firm Lorind Chand v. Bahadur Khan.
3. ('97) 19 All. 348 (F.B.), Brij Mohan Das v. Munnu Bibi.
4. ('18) 5 A. I. R. 1918 Mad. 23 : 45 I. C. 460, Vidhya Theeratha Swamigal v. Venkatarama Iyer.
5. ('99) 26 Cal. 414 (F.B.), Bishambhur Haldar v. Bonomali Haldar.
6. ('08) 35 Cal. 728, Indian Publishers v. Samuel Charles Aldrise.

D. N. Aggarwal — for Appellant.

Inder Dev Dua — for Respondent.

Khosla J. — The only point for our decision in this second appeal is whether the plaintiff's suit was within limitation. In order to appreciate this point it is necessary to relate the sequence of events leading up to the institution of this suit.

[2] On 16-8-1924 Daulat Ram defendant mortgaged his occupancy rights in some land in favour of Sukh Dial, father of the present plaintiff. Sukh Dial, the mortgagee, brought a suit for the recovery of the mortgage money by sale of the property and obtained a preliminary decree and then a final decree. He took out execution of this decree on 8-12-1931 but the application was dismissed in default on 16-2-1932.

[3] The judgment-debtor, that is, the mortgagor was adjudicated insolvent on 15-4-1932 and during the course of the insolvency proceedings the Official Receiver sold the mortgaged property to the mortgagee in full satisfaction of the decree held by him. The decree was thus satisfied but the satisfaction was not recorded by the executing Court. The landlords now instituted a suit for setting aside the sale in favour of the decree-holder on the ground that as their consent had not been obtained by the Official Receiver the sale was ineffective. The landlords were successful and the sale of the occupancy rights was set aside. The matter was finally disposed of by the Commissioner, Jullundur Division, on 25-4-1940. The plaintiff was thus dispossessed. The plaintiff then on 2-7-1940 made a fresh application for executing his mortgage decree. Objection was taken that this application was barred by time as it had been presented more than three years after the date of the dismissal of the previous application (16-2-1932). The applicant, however, contended that for a certain period his decree had remained satisfied and that this period, namely, from the date of the sale in his favour and the date when the sale was set aside finally should be excluded.

The question of limitation was decided in favour of the plaintiff by the executing Court, by the Additional District Judge, Ferozepore, on first appeal and by Dalip Singh J. on second appeal. A Division Bench of the Lahore High Court, however, on a Letters Patent appeal held that the application for execution was barred by limitation, having been filed more than eight years after the dismissal of the previous application.

[4] The plaintiff then filed the present suit on 14th October 1944. He invoked the provisions of S. 14, Limitation Act, and claimed to exclude the period between 2nd July 1940 (the date of the filing of the execution application) and 14th April 1944 (the date on which the Letters Patent appeal was decided). His contention, therefore, was that the present suit was within limitation. The trial Court held that the suit was within limitation but the learned District Judge took the contrary view and dismissed the suit.

[5] The only question for our decision, therefore, is whether the period between 2nd July 1940 and 14th April 1944 can be excluded by virtue of the provisions of S. 14, Limitation Act. The learned counsel for the appellant has contended that the previous execution application failed because the executing Court had no jurisdiction to entertain it. He also maintained that the plaintiff had been pursuing this application with due diligence and in good faith. In my view the question of due diligence and good faith must be answered in favour of the plaintiff for he was certainly not acting *mala fide* or carelessly in pursuing his application in the executing Court. He must have been under the honest belief that he could maintain an application for execution in the executing Court. The question, however, remains whether the dismissal of the application was on account of lack of jurisdiction or other like cause. Section 14 (1), Limitation Act, is in the following terms :

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance, or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

The application of the appellant was dismissed as barred by time and the learned counsel for the appellant maintains that the question of limitation is a question of jurisdiction. He has not been able to cite any direct authority in support of this view but has drawn our attention to a number of cases which appear to me to have no relevancy whatsoever to the point in issue. He cited 22 ALL. 248,¹ in which case misjoinder of causes of action was held to be a like cause,

but Explan. 3 to S. 14 specifically mentions misjoinder of causes of action. A.I.R. 1935 Lah. 736² and 19 ALL. 348³ do not appear to have any bearing on the points in issue. The only two cases in which the question of limitation was considered are A. I. R. 1918 Mad. 23⁴ and 26 Cal. 414.⁵ In the Madras case a decree-holder made an application for the transfer of his decree. This application was dismissed on two grounds (1) as barred by time and (2) because the decree-holder had not shown that there was no property belonging to the judgment-debtor within the jurisdiction of the executing Court. It was held that this dismissal could not be said to be on the ground of lack of jurisdiction or other like cause, and S. 14, Limitation Act, could not save limitation. The Calcutta case is even more in point. This case was referred by a Division Bench to a Full Bench. In this case the previous proceedings consisted of an appeal preferred to the Commissioner. The Commissioner had held the appeal to be barred by time, and the question arose whether the proceedings before the Commissioner had failed from defect of jurisdiction or other cause of a like nature. The learned Judges of the Division Bench in their referring order took the view that the proceedings had not failed from defect of jurisdiction or other cause of a like nature. The referring order contains the following observations :

"But in this case the appeal to the Commissioner was clearly out of time as well under S. 2, Bengal Act 7 [VII] of 1868 as under S. 16 of Bengal Act 7 [VII] of 1880, the only provisions of the law under which such an appeal could lie; and though under S. 5, Limitation Act, the appeal could be admitted for sufficient cause though out of time, it was for the Court to which the appeal was made to say whether there was any sufficient cause for admitting it. As no such sufficient cause was shown before the Commissioner, the appeal to him must be taken to have been barred by limitation, and it, therefore, failed for a reason other than 'defect of jurisdiction or other cause of a like nature' within the meaning of S. 14, Limitation Act."

This view of the referring Judges was approved of by the Full Bench.

[6] Learned counsel for the appellant has drawn our attention to certain observations made by the learned Judges hearing the Letters Patent appeal and has sought shelter behind those observations. When dealing with a certain argument raised by the counsel in that case the learned Judges remarked :

"In my judgment the setting aside of the sale that had been arranged between the Official Receiver and the decree-holder outside the executing Court in consideration for which the decree-holder had agreed to satisfy his decretal-debt furnished an absolutely new cause of action to him to bring a suit on the failure of that consideration against the judgment-debtor for recovery of the debt which stood revived on that contingency happening."

Learned counsel for the appellant argued that

the only remedy open to the plaintiff was by way of a separate suit. I cannot, however, construe the observations of the learned Judges in this manner. When the sale by the Official Receiver in favour of the plaintiff was set aside the plaintiff had no doubt open to him the remedy of filing a fresh suit but he could also maintain an application for execution provided it were within time. The question for decision is not whether the plaintiff could have availed himself of a second remedy but of whether the remedy which he chose to pursue failed because of defective jurisdiction. It cannot be denied that had the plaintiff put in his application for execution within 3 years of the dismissal of the first application his application could have been entertained. That being so, the executing Court cannot be said to have suffered from any defect of jurisdiction. Jurisdiction there certainly was. The plaintiff's application failed not because of defect of jurisdiction or other like cause but because on merits the application was barred by time, and in such a case the provisions of S. 14, Limitation Act, cannot be invoked.

[7] For the reasons given above, I would hold that the plaintiff's suit is barred by time and was rightly dismissed by the learned District Judge. I would, therefore, dismiss this appeal with costs.

[8] **Teja Singh J.**—I agree and wish to add a few words. The important words of cl. (1) of S. 14, Limitation Act, that define the scope of the previous proceeding the time spent in prosecuting which can be excluded, are as follows :

"..... Where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it."

[9] The phrase "other cause of a like nature" used in conjunction with "defect of jurisdiction" is clear enough, but the use of the concluding words of the sub-section, namely, "unable to entertain it," make it further clear that the proceeding should not have failed on merits. Had the intention of the Legislature been otherwise, they should have used the words "unable to decide it" or some such other words. It may be pointed out in this connection that the 1859 Act used the words "unable to decide upon it" and that of 1871 "unable to try it." By changing these words to the words "unable to entertain it" in the Act of 1908 the Legislature appears to have intended that either because of a defect of jurisdiction or of other cause of a like nature the Court which was seised of the previous civil proceeding should neither have decided it nor tried it but should have been simply unable to entertain it. The following observations made by Maclean C. J. in 35 Cal. 728⁶ may be quoted with advantage :

"A Court may be able to entertain a suit in its

inception, but be unable to decide it on the merits, owing to some defect, not in jurisdiction, but in procedure. There must have been some reason for this change of language, and a possible reason is that the Legislature intended to limit the benefit of the section to cases, where the Court had no power to embark upon the case at all."

[10] Now, when a Court dismisses a suit or an application on the ground that it is barred by time it decides it on merits. In any case, it cannot be said that it is unable to entertain it either from defect of jurisdiction or other cause of a like nature. In the present case, the previous proceedings, the time spent during which, the plaintiff wishes to be excluded were started on an application for execution and it was held that the execution application was barred by time. So the case does not fall under the purview of S. 14 and the appeal must necessarily fail.

D.R.R.

Appeal dismissed.

A.I.R. (35) 1948 East Punjab 70 [C. N. 26.]

TEJA SINGH J.

Gurdev Singh and another—Defendants—Appellants v. Partapa—Plaintiff-Respondent.

Second Appeal No. 900 of 1946, Decided on 11-12-1947, against decree of Dist. Judge, Ludhiana, D-14-12-1945.

(a) Civil P. C. (1908), S. 100 — Concurrent finding that plaintiff is in possession — Finding cannot be disturbed in second appeal.

Where both the lower Courts have come to the conclusion that the possession of the suit land was with the plaintiff, it is a finding of fact and cannot be disturbed in second appeal. [Para 4]

Annotation : ('44-Com.) Civil P. C., Ss. 100 & 101 N. 54, Pt. 2.

(b) Civil P. C. (1908), O. 21, Rr. 10, 35 — Execution application dismissed for default after issue of warrant for delivery of possession — Warrant is cancelled ipso facto — Delivery of possession thereunder is ineffective — Application restored—Warrant may be revived.

Where the execution application on the strength of which a warrant for delivery of possession is issued is dismissed for default the warrant stands cancelled ipso facto and the delivery of possession in execution of the warrant has no effect in law. If the decree-holder applies for restoration of the execution application and such application is accepted, all the proceedings including the warrant might be revived. [Para 4]

Annotation: ('44-Com.) Civil P. C., O. 21, R. 10 N. 9.

(c) Punjab Consolidation of Holdings Act (4 [IV] of 1936), Ss. 12, 13 — Rights of parties in allotted lands — Persons holding decrees against such parties — Rights of — Warrant for possession obtained against original land — Delivery of possession of allotted land is illegal and without authority

Under S. 12, Punjab Consolidation of Holdings Act, 1936, the right of a party in the holding or land allotted to him in pursuance of a scheme of consolidation is the same as he had in the original holding or land. Holders of decree against parties having rights against the original land can also enforce their rights against the allotted land after taking proper proceedings for the purpose. But in absence of such proceedings a warrant for delivery of possession issued against the original

land cannot be executed against the allotted land and the delivery of possession of the allotted land under such warrant is illegal and beyond the authority of the persons executing the warrant. [Para 4]

Mela Ram — for Appellant.

M. C. Sud — for Respondent.

Judgment. — The facts giving rise to the litigation out of which this second appeal has arisen are as follows. One Partapa mortgaged certain land with Gauhar Singh and Mehar Singh on 21-8-1919. The mortgage was of simple nature but it appears that according to one of the conditions the mortgagees were entitled to take possession on the happening of certain contingencies. Taking advantage of this condition Gauhar Singh and Mehar Singh brought a suit for possession of the mortgaged property and obtained a decree on 20-1-1932. They made several efforts to obtain possession in execution of the mortgage decree but for reasons into which it is not necessary to go here, they failed in this. The last execution application was made by Gauhar Singh on 19-1-1944. The Sub-Judge, in whose Court it was filed, returned it for presentation to the proper Court on the ground that he had no jurisdiction to entertain it. After that Gauhar Singh made another application to the District Judge, who sent it for disposal to Sheikh Maqbul Ahmad, Sub-Judge, on 21-1-1944. On 2-2-1944, Sheikh Maqbul Ahmad issued a warrant for possession of the land and adjourned the case to 11-3-1944. On that day Gauhar Singh was absent and the execution application was dismissed in default. He made an application for restoration of his previous application on the same day but before the application could be restored or in fact any order could be passed thereon, Gauhar Singh appeared in Court on 13-5-1944, and stated that he did not wish to proceed with the application because he had possession of the land. It may here be mentioned that consolidation of holdings took place in the village in which the above mentioned land was situate and Rai Singh, who was all along in the possession of the land, was allotted certain other land in lieu of it. It is alleged that the Girdawar Kanugo to whom the warrant of possession issued under the orders of Sh. Maqbul Ahmad had been sent for execution, went to Partapa's village on 23-4-1944, accompanied by a Patwari and awarded to the decree-holder the possession of the land which Partapa had obtained by virtue of consolidation of holdings and not the land which he had originally mortgaged to Gauhar Singh and Mehar Singh and about which they had obtained the decree. The Girdawar and the Patwari also made a report in respect of the delivery of possession to Gauhar Singh and Mehar Singh. Relying upon this report Gauhar Singh and Mehar Singh had a mutation entered by the Patwari showing them as mortgagees in pos-

session of the land. On this Partapa instituted the present suit for a declaration. The land which is the subject-matter of the suit is the one which had come to his share in the consolidation of holdings and to which related the mutation. Partapa's allegations were that though he had mortgaged this land with Gauhar Singh and Mehar Singh and though they had obtained a decree for possession in respect thereof, they had lost all right to it, because the possession of the land had always remained with him and Gauhar Singh and Mehar Singh did not obtain possession by execution of their decree within twelve years of the date thereof. He denied that the decree-holders were ever put in possession of the land and maintained that the possession was still with him. He further contended that the delivery of possession to the decree-holders even if it took place on 23-4-1944 was illegal and ineffective, inasmuch as the twelve years period fixed by law for execution of the decree had expired by then and the last application for execution which Gauhar Singh had made had been dismissed and no proceedings were pending at that time. No reference was made in the plaint to the proceeding relating to the consolidation of the holding and obviously the statement of fact contained therein that it was the suit land that had been mortgaged by the plaintiff (Partapa) to the defendants (Gauhar Singh and Mehar Singh) and the decree in the latter's favour had been passed in respect of that land was incorrect. The defendants resisted the suit mainly on the grounds (1) that the plaintiff not being in actual possession of the suit land could not maintain an action for mere declaration and (2) that possession had been awarded to them by Girdwar Kanugo and the Patwari in execution of the warrant which had been validly issued by Sh. Maqbul Ahmad and consequently no question of limitation arose. So far as the wrong statements of fact made in the plaint and mentioned above are concerned, the defendants appeared to have taken no notice of them. On the other hand, they too stated in so many words, in their written statements that the mortgage as well as the decree obtained by them against Partapa in the previous case related to the suit land. The following issues were raised by the trial Court :

"1. Did defendants get legal possession of the land in dispute in pursuance of their decree and if not (what is?) its effect? 2. If issue No. 1 is proved, then whether plaintiff can challenge the mutation proceedings? 3. Is plaintiff in possession and consequently he can sue for a declaration?"

[2] All the three issues were found for the plaintiff and the suit was decreed. The defendants after having unsuccessfully appealed to the District Judge have now preferred this second appeal.

[3] The trial Court in its final judgment has taken due notice of the fact that the suit land was not the subject-matter of the mortgage and the decree obtained by Gauhar Singh and Mehar Singh did not relate to it. But it appears that the mistakes on the questions of fact under which both the parties laboured and which were incorporated in their pleadings were not detected till the Patwari came into the witness-box and proved the report regarding the delivery of possession (Ex. D 1). The reason why the mistakes did not come to light at the time the issues were framed evidently was that the trial Court did not take the trouble of examining the parties. Had it done so and interrogated the parties on the principal questions involved, as it was its duty to do, I have no doubt that the plaintiff as well as the defendants would then have explained the real position. The pity of it is that even when the Patwari made the statement, the trial Sub-Judge recorded it more or less like a machine and without trying to understand what the real position was. A mere perusal of Ex. D-1 makes it clear that the numbers of fields mentioned in the decree-sheet with which the warrant of possession was accompanied were of the fields, which were the property of Partapa before the consolidation of holdings but the fields of which possession was delivered to the decree-holders were those that he had got by virtue of consolidation of holdings. It goes without saying that at the time the Patwari gave the evidence, Ex.D-1 must have been before the Court. In fact, the Patwari's evidence related to this document and to what was contained therein and yet the trial Sub-Judge while taking down the Patwari's statement recorded these words :

"A warrant for possession of the land in dispute was received from a Civil Court by the Girdawar Kanugo and possession was to be delivered to defendants."

From what I have said above and from what is contained in Ex. D-1, it is clear that the warrant of possession did not relate to the land in dispute. It related, and could only relate, to the land which Partapa had mortgaged with Gauhar Singh and Mehar Singh and about which they had been granted the decree. Had the trial Sub-Judge taken an intelligent interest in the proceedings of the case, he would never have recorded this statement and much of the confusion which resulted therein would have been avoided.

[4] Coming now to the merits of the appeal. Both the Courts below have come to the conclusion that the suit land is still in possession of Partapa. This being a finding of fact cannot be disturbed in second appeal. If this finding be correct and after hearing the appellant's counsel I am of the opinion that it is the contention that the defendants obtained possession on 23-4.

1944, must be rejected as unfounded. But even if it be assumed that the Patwari and the Girdawar did visit the land on 23-4-1944 and executed the warrant by the delivery of possession to the appellants, it had no effect in law, because the application for execution on the strength of which the warrant had been issued had in the meanwhile been dismissed and the warrant stood cancelled *ipso facto*. The appellant's counsel argued that since his client applied for the restoration of the execution application on the very day on which it was dismissed, all the proceedings including the warrant were revived. This may probably have been the case had the application for restoration been accepted but this was not done and as I have already pointed out, before the Court could restore the application or treat the application for restoration as a fresh application for execution, Gauhar Singh took the matter out of its hands by stating that he had obtained the possession and nothing further need be done. The result was that the application for restoration was rejected and the previous order of the Court by which the original execution application had been dismissed stood. In addition, it may be pointed out that the warrant of possession issued by the executing Court related to the original land of Partapa and not the land which he had obtained on consolidation of holdings in lieu of it. Even if it be assumed for the sake of argument that because the Girdawar and the Patwari, who had to execute that warrant, did not know that the execution application in connection with which it had been issued, had been dismissed in default in the meantime and consequently there was nothing illegal in their awarding possession to the decree-holders, they could award possession only of the land mentioned in the warrant. It is correct that according to S. 12, Punjab Consolidation of Holdings Act, 1936, the right of a party in the holding or land allotted to him in pursuance of a scheme of consolidation is the same as he had in his original holding or tenancy, and if the decree-holders had taken proper proceedings to enforce their right against the land which Partapa had obtained in lieu of his original land, they might have succeeded in enforcing their right against the suit land, but surely the Girdawar Kanugo and the Patwari had no right to give them the possession of the suit land in execution of the warrant the operation of which was confined to the other land and if they did so, they acted illegally and without any authority. The result is that the appeal fails and is dismissed with costs.

D.R.R.

Appeal dismissed.

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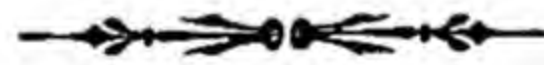
1948

[Vol. 35]

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WITH PARALLEL REFERENCES TO

- (1) Pak. L. R. (1948) LAHORE (2) 50 PUNJAB LAW REPORTER
(3) 49 CRIMINAL LAW JOURNAL



CITATION : A. I. R. (35) 1948 LAHORE



PUBLISHERS
THE ALL INDIA REPORTER LTD.,
NAGPUR, C. P.
1948



Printed by L. MELA RAM, at the All India Reporter Press, and Published by
D. V. CHITALEY, B.A., LL.B., Advocate, Nagpur, for the All India Reporter Ltd., at
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LAHORE HIGH COURT

1948

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" Dr. Sir Muhammad Abdur Rahman, KT., LL.D., Khan Bahadur, Bar-at-law (*Acting*).
" Mr. Muhammad Munir, M.A., LL.B. (*Acting*).

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" Mr. Muhammad Munir, M.A., LL.B.
" " E. C. Marten, I.C.S.
" " Mohammad Sharif, B.A., LL.B.
" " A. R. Cornelius, I.C.S.
" " S. A. Rahman, I.C.S.
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645	" "	184		230	" "	64		310	" "	271		200	1948 L	69		419	" S	130	
679	1947 PC	176		235	" "	6		312	" "	183		203	1947 P	37		424	" P	105	
687	" L	262		249	" "	77		314	" "	210		206	" A	51		425	" A	109	
696	" "	304		253	" "	27		318	" "	262		207	" P	16		431	" "	123	
704	" "	355		257	1947 "	355						208	" A	4		433	1948 P	58	
720	1949 "	83		265	1948 "	120						209	" P	27		435	1947 M	133	
727	1948 PC	36		274	1947 "	147						216	" S	29		436	" B	366	
741	" "	33		296	1945 "	223						217	1946 P	432		440	1948 P	77	
749	1947 L	147		305	1948 "	74						221	1947 S	30		442	1947 M	116	
795	" "	340		311	" "	94						222	" P	23		443	" A	394	
809	1948 PC	102										226	" M	66		448	1948 P	78	
828	1947 L	324										227	1946 P	426		449	1947 A	429	
867	1949 "	34										229	1947 O	148		459	" M	124	
Pak LR (1948) Lah												231	" C	382		460	1946 P	210	
Pak LR A I R												233	" B	28		464	1948 C	95	
1	1949 L	1										235	" O	158		467	" A	17	
19	" "	53										236	1948 C	42		474	1947 B	161	
53	" "	28										240	1946 P	418		481	1948 S	109	
79	" "	69										241	1948 C	7		483	1947 P	181	
89	" "	63										242	1947 P	90		492	" B	163	
94	" "	72										252	1948 N	28		497	" P	152	
107	" "	91										256	" C	116		509	" M	134	
116	" "	65										257	1946 M	349		511	" B	90	
49 P L R												258	1947 P	54		513	" S	35	
PLR A I R												263	" M	62		514	" PC	87	
1	1947 L	273										264	" P	64		515	" M	118	
6	" "	255										266	" M	89		516	" S	36	
8	1948 "	49										267	1948 C	39		521	" M	129	
10	1947 "	252										269	1947 L	188		533	" PC	67	
14	" "	259										281	" O	132		539	" A	72	
16	1948 "	69										282	" A	139		541	1948 C	107	
20	1947 "	162										284	" M	304		542	" O	1	
29	" "	267										285	" A	403		552	" C	1	
32	" "	256										286	" P	283		554	" B	146	
36	" "	265										287	" M	303		556	1947 S	192	
38	" "	249										289	" P	67		558	1948 P	8	
42	1948 "	24										295	1948 L	49		561	" O	102	
49	1947 "	272										296	1947 S	129		563	1947 M	454	
51	1948 "	1										299	" M	358		564	" S	68	
57	1947 "	280										300	" S	128		565	1948 P	62	
61	1948 "	5										301	1948 P	73		573	1947 S	60	
62	1946 "	338										302	1947 M	423		576	1948 C	104	
70	1947 "	319										304	" "	430		577	1947 S	63	
72	" "	276										305	" B	310		578	1948 P	122	
74	" "	352										317	" M	311		583	1947 A	91	
79	" "	335										319	" P	149		584	" M	114	
85	" "	278										322	" M	429		587	1948 C	47	
93	" "	412										324	" P	58		588	1947 B	151	
1948 Indexes (Lah.) 2b (4 pages.)												326	" M	308		598	1948 C	3	
												327	1948 P	74		599	" L	47	
												329	1947 B	345					

48 Cr L J				48 Cr L J				49 Cr L J				49 Cr L J				49 Cr L J			
CrLJ	A	I	R	CrLJ	A	I	R	CrLJ	A	I	R	CrLJ	A	I	R	CrLJ	A	I	R
604	1948	C	5	927	1948	C	4	51	1948	S	34	230	1948	N	199	395	1948	M	329
624	"	L	151	929	"	B	6	52	"	N	69	240	"	C	184	397	"	C	242
630	"	"	199	931	"	L	6	53	"	M	104	241	"	M	241	401	"	P	291
646	"	O	40	939	"	A	7	54	"	N	71	242	"	N	209	404	"	M	357
663	"	C	125	941	"	"	26	56	"	A	106	243	"	A	211	405	"	C	246
664	1947	M	174	942	"	P	5	58	"	N	74	246	"	P	225	406	"	P	294
665	1948	C	103	945	"	A	12	60	"	M	103	249	"	N	210	409	"	N	277
666	"	O	19	948	"	O	17	61	"	N	76	251	"	P	229	410	"	C	247
668	"	C	128	950	"	P	29	62	"	A	103	256	"	M	242	414	"	P	297
676	1947	M	184	951	"	O	30	65a	"	M	118	257	"	A	225	415	"	M	358
682	1948	C	110	952	"	P	31	65b	"	P	110	258	"	PC	81	418	"	P	299
690	1947	M	183	953	1947	Pesh	58	66	"	N	78	259	"	A	227	419	"	M	268
691	"	A	191	955	1948	A	38	69	"	M	114	261	"	PC	82	422	"	A	205
700	"	S	66	961	"	L	19	70	"	P	108	264	"	A	237	428	"	M	262
703	"	P	235	963	"	M	16	71	"	M	115	265	"	M	281	430	"	EP	15
705	"	M	187	964	"	L	27	72	"	S	40	271	"	A	229	432	"	M	261
706	"	A	173	966	"	A	43	89	"	M	113	279	"	O	179	433	"	L	97
708	"	L	220	967	"	L	24	91	"	S	57	282	"	A	238	434	"	M	264
716	"	M	156	970	"	M	9	93	"	M	117	283	"	C	186	436	"	A	223
717	"	L	249	971	"	L	30	94	"	S	59	284	"	A	239	438	"	M	270
720	"	M	195	973	"	M	23	98	"	A	129	286	"	O	181	440	"	PC	63
721	"	B	409	976	"	B	44	100	"	M	116	287	"	A	241	443	"	M	258
726	"	M	120	977	"	L	43	101	"	A	135	289	"	C	192	445	"	P	222
727	"	B	187	981	"	S	23	102	"	M	119	290	"	O	183	447	"	M	266
730	"	M	161	982	"	A	50	103	"	A	136	291a	"	C	205	449	"	C	274
731	"	B	438	983	"	M	39	104	"	C	108	291b	"	O	184	451	"	M	232
737	"	L	262	984	"	L	33	105	"	A	137	294	"	C	193	452	"	C	277
741	"	O	418	994	"	A	59	106	"	L	74	295	"	O	187	453	"	M	260
744	"	B	465	995	"	S	22	108	"	O	114	297	"	C	187	454	"	S	114
750	"	Pesh	19	996	"	M	45	109	"	A	157	300	"	L	117	456	"	M	234
755	"	O	280	997	"	P	56	110	"	L	75	304	"	C	194	457	"	A	339
765	"	PC	113	999	"	C	58	112	"	O	113	305	"	L	120	459	"	M	230
783	1948	O	25	1000	"	M	50	113	"	M	133	311	"	C	190	460	"	B	326
791	1947	PC	82	1001	"	B	72	114	"	O	97	313	"	M	291	461	"	M	251
815	"	C	318	1002	"	M	49	115	"	C	129	314	"	C	197	462	"	P	309
822	"	M	132	1002	"	B	67	116	"	O	99	315	"	A	242	464	"	M	225
823	"	S	107	1007	"	A	79	120	"	C	130	316	"	M	288	465	"	B	334
826	"	M	191	1008	"	M	63	121	"	N	80	318	"	P	234	467	"	M	273
829	"	A	99					122	"	O	104	320	"	M	290	469	"	C	278
835	"	M	223					124	"	N	82	322	"	N	243	477	"	A	342
836	"	P	167					126	"	O	108	323	"	P	285	480	"	L	161
837	"	M	207					127	"	N	83	326	"	N	244	503	"	PC	128
838	"	P	168					129	"	A	162	327	"	S	97	509	"	C	287
842	"	M	193					132	"	P	135	331	"	N	245	511	"	B	236
843	"	S	114					140	"	A	170	335	"	M	292	513	"	P	255
844	"	L	227					147	"	L	80	337	"	B	237	514	"	M	300
849	"	S	190					148	"	A	165	338	"	A	276	515	"	B	357
851	"	A	393					150	"	L	81	340	"	M	297	516	"	O	289
852	"	S	192					153	"	B	153	341	"	B	239	518	"	B	358
853	"	A	394					156	"	L	84	345	"	A	278	519	"	N	341
857	"	"	403					160	"	A	167	348	"	B	244	520	"	C	290
858	"	"	408					161	"	L	87	352	"	A	281	521	"	A	366
859	"	"	424					165	"	B	156	357	"	B	248	524	"	B	360
864	"	"	429					168	"	A	168	358	"	A	285	528	"	C	291
866	"	"	434					170	"	L	92	360	"	M	293	529	"	N	342
868	"	"	436					172	"	A	144	361	"	A	287	531	"	L	184
873	"	B	467					174	"	M	178	362	"	B	250	540	"	M	422
874	"	M	433					175	"	A	177	367	"	A	289	543	"	C	292
879	"	"	437					178	"	S	67	369	"	M	294	545	"	A	369
877	"	PC	186					185	"	A	182	373	"	N	249	551	"	B	364
880	"	M	451					188	"	S	76	374	"	A	298	554	"	M	424
882	"	L	410					190	"	M	177	375	"	P	290	557	"	P	355
885	"	"	412					191	"	S	63	376	"	N	251	558	"	S	122
886	"	FC	38					193	"	B	161	378	"	A	299	561	"	N	314
897	"	L	361					194	"	A	185	379	"	C	214	567	"	C	294
902	"	B	361					196	"	B	163	383	"	N	250	570	"	M	427
903	"	L	366					202	"	O	130	384	"	O	246	573	"	A	393
908	"	C	390					203	"	B	169	385	"	M	324	576	"	P	356
910	"	L	383					207	"	S	65	387	"	N	274	577	"	A	433
912	"	B	364					208	"	B	173	388	"	A	321	579	"	B	417
915	"	L	340					212	"	O	131	390	"	M	326	586	"	C	342
								216	"	B	197	394	"	N	276	587	1949	M	76

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49 Cr L J				49 Cr L J				228 I C				228 I C				229 I C			
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589	1948	P	435	735	1948	A	440	187	1947	C	290	434	1947	L	1	16	1947	B	45
592	"	N	416	737	"	M	474	192	1948	P	10	448	"	A	345	17	"	P	34
593	1949	B	29	740	"	A	435	195	1947	M	259	451	"	M	34	20	1948	A	131
595	"	A	77	745	"	M	503	198	1946	P	467	453	"	P	23	23	1946	C	518
596	"	P	40	747	"	P	413	201	1947	O	135	457	"	N	201	26	1947	A	343
597	"	M	66	748	"	M	492	205	1946	P	141	462	1946	P	426	29	1948	C	112
598	"	O	56	751	1949	A	97	206	1947	L	244	465	1947	B	15	30	"	O	22
599	"	P	36	752	1948	M	527	212	"	P	5	468	1946	P	423	31	1947	A	5
602	"	N	18	753	1949	C	85	215	"	M	36	470	1947	M	3	34	"	P	42
603	"	M	71	754	1948	M	510	217	"	P	380	472	1946	P	432	37	"	N	205
604	"	P	44	757	1949	C	87	219	1946	S	171	476	1947	O	129	40	1946	P	177
605	"	A	78	758a	1948	M	509	224	"	P	471	478	1946	P	430	47	1947	A	352
608	"	C	57	758b	"	N	413	225	1947	O	122	481	1947	M	33	52	"	P	33
609	"	A	73					231	"	P	275	482	1946	P	443	54	"	O	138
612	"	P	47		228 I C			233	1946	L	456	486	1947	B	30	55	"	P	58
623	1948	N	414	IC	AIR			236	"	P	31	489	"	M	2	57	"	L	100
624	1949	A	81	1	1947	N	121	239	"	B	146	491	1946	L	462	59	"	P	144
625	"	FC	1	4	1946	S	166	242	1947	A	188	493	1947	A	256	62	"	O	157
630	"	B	36	8	1947	A	302	245	"	O	145	499	"	N	208	63	1948	N	119
631	"	EP	17	12	"	M	247	247	"	N	115	501	1946	M	542	66	1947	S	24
633	"	A	75	13	"	C	278	248	"	PC	37	503	1947	C	19	68	"	FC	19
635	"	C	55	15	"	O	114	251	"	B	38	506	1946	M	398	73	1946	C	521
636	"	FO	11	17	"	M	243	256	"	C	17	517	1948	O	24	76	1947	A	1
637	"	A	47	18	1946	B	333	258	"	L	47	518	1946	M	537	79	"	M	16
639	"	P	39	21	1947	O	95	260	"	C	14	519	1947	N	157	80	"	PC	29
640	"	M	77	24	1946	C	452	263	"	O	142	522	"	O	143	84	1946	B	516
641	"	A	84	31	1947	O	93	264	"	P	13	523	"	C	25	102	1947	O	148
645	"	B	37	32	1945	L	99	268	"	FC	1	525	1948	N	24	103	"	C	382
647a	"	C	58	35	1947	L	243	274	1946	P	239	530	1947	B	18	105	"	B	28
647b	"	N	19	36	"	P	205	277	"	M	250	536	"	S	18	107	"	O	158
649	"	P	61	39	"	M	243	278	"	P	134	540	"	M	1	109	1948	C	42
652	"	M	95	40	"	P	222	280	1947	A	67	541	"	S	12	112	1947	O	98
655	"	C	59	44	1946	L	444	282	1946	P	235	547	1946	A	352	115	1948	C	7
657	"	P	58	51	"	P	169	286	"	M	509	550	1948	N	31	117	"	N	28
660	1948	PC	156	56	1947	A	184	296	1947	P	281	551	1946	A	126	121	"	C	81
663	1949	A	82	59	1946	P	196	299	1948	C	19	552	1947	M	66	123	1947	A	18
665	1948	PC	183	62	"	C	235	309	1947	P	37	553	"	A	311	128	"	Pesh	12
666	1949	M	75	64	1947	P	236	313	"	B	36	555	"	C	11	132	"	N	246
667	1948	PC	184	67	1946	C	326	315	"	P	17	559	"	P	54	134	"	O	171
668	1949	P	41	71	1947	P	234	322	"	A	61	563	"	A	332	138	"	N	188
671	1948	PC	186	72	"	A	180	323	"	C	40	567	"	P	90	143	"	M	47
677	"	B	370	73	"	P	232	324	1946	M	538	576	"	N	101	145	"	L	112
681	"	A	402	75	"	S	105	325	1947	A	4	583	"	P	64	150	"	M	49
682	"	M	466	77	"	A	178	326	"	L	40	584	"	C	18	152	1948	A	125
683	"	P	401	78	1946	B	142	333	"	A	71	585	"	A	8	157	"	C	116
685	"	B	374	82	"	N	190	334	1948	L	69	588	"	M	89	159	1947	P	74
686	"	A	403	87	1947	O	128	337	1947	A	51	589	"	FC	49	161	"	A	139
689	"	M	467	90	1946	B	439	338	"	B	33	591	"	B	24	163	"	M	304
690	"	P	406	97	"	Pesh	9	341	"	A	245	594	1946	M	349	164	"	A	403
691	"	B	376	100	"	L	200	346	"	O	133	596	1947	PC	50	165	"	P	105
692	"	A	405	117	1947	PC	34	348	1946	C	528	599	"	L	102	167	"	M	303
696	"	P	409	120	1946	FC	32	350	1947	O	146	604	"	FC	17	168	1948	L	49
701	"	A	409	121	1947	Pesh	7	352	"	Pesh	1	606	"	M	62	170	1947	S	129
703	"	M	470	123	1946	B	533	360	"	P	16	607	"	L	36	173	"	M	358
704	"	P	414	126	1947	FC	9	361	"	N	177	609	1948	A	75	174	"	S	128
705	"	M	472	130	"	Pesh	8	363	1948	A	117	612	"	C	111	175	1948	P	73
706	"	A	430	132	"	A	275	368	1947	P	27	614	1947	PC	40	176	1947	M	423
708	"	B	377	139	"	FC	12	375	"	S	1	619	1948	C	39	177	"	"	430
709	"	M	479	141	1946	Pesh	12	378	"	P	290	620	1947	B	42	178	"	B	310
710	"	A	423	144	"	P	84	382	"	O	131	623	"	L	188	190	"	M	311
711	"	M	473	153	1947	M	264	384	1946	P	136	635	"	S	27	193	"	N	243
712	"	PC	216	155	"	A	250	386	"	C	526	637	"	O	132	196	"	PC	44
713	"	M	471	157	"	S	122	388	"	P	418	638	"	Pesh	11	201	"	M	57
714	"	A	425	164	"	M	248	389	1947	B	4	640	"	M	5	202	1948	O	176
716	"	M	477	169	"	A	235	401	1946	C	396					203	1947	PC	155
717	"	A	411	170	"	S	112	420	"	M	539		229 I C			211	"	M	54
720	"	M	478	172	"	M	245	423	1947	S	29	IC	AIR			212	"	B	46
721	"	A	422	173	"	N	143	424	"	A	413	1	1947	FC	14	216	"	O	239
724	"	M	469	175	"	P	385	426	"	C	21	5	"	P	67	217	"	M	51
726	"	A	414	178	"	M	239	430	"	B	1	11	"	A	405	219	"	N	154
734	"	M	468	182	"	P	361	433	"	S	30	14	"	P	76	220	1948	A	34

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229 I C				229 I C				230 I C				230 I C				231 I C			
IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R
222	1947	N	159	512	1947	M	64	115	1947	S	35	366	1948	N	92	90	1947	P	175
225	1948	A	36	513	"	N	229	118	"	"	36	369	1947	B	263	93	1948	O	110
227	1947	B	49	515	"	L	82	123	"	M	129	370	"	A	27	94	1947	P	162
232	"	M	429	526	"	N	128	135	"	PC	67	375	"	B	131	98	"	A	191
234	1948	P	74	527	"	A	141	141	"	A	72	377	1948	N	41	107	"	S	66
236	1947	M	308	528	1948	N	20	143	1948	C	107	381	1947	L	267	110	"	P	235
237	"	C	126	529	"	P	58	144	"	O	1	383	"	M	276	112	"	PC	122
239	"	M	52	530	1947	M	133	154	"	C	1	385	"	A	34	114	"	P	177
241	"	N	86	532	"	B	366	156	1947	B	146	387	"	M	18	115	"	A	153
243	"	M	56	536	1948	P	77	158	"	S	192	404	1948	L	151	118	"	P	233
244	"	B	345	538	1947	M	116	160	1948	P	8	407	1947	N	187	119	1948	N	35
262	1948	P	25	539	"	A	394	163	"	C	102	408	"	B	184	123	1947	P	125
265	1947	O	173	544	"	N	175	165	1947	M	454	410	1946	L	199	127	"	O	233
267	"	M	59	545	1948	P	78	166	"	S	68	411	1947	B	388	131	"	B	144
268	"	A	40	546	1947	A	429	167	1948	P	62	420	"	A	225	132	1948	O	49
270	"	B	54	556	"	M	124	175	1947	S	60	424	"	B	329	134	"	N	15
276	1948	C	16	557	1946	P	210	178	"	O	87	426	1948	C	40	136	1947	L	272
279	1947	L	306	561	1947	A	37	185	"	M	83	429	1947	B	338	137	"	M	135
282	1948	P	32	562	"	L	171	187	"	L	185	436	"	M	109	139	"	B	343
284	"	C	78	564	1948	N	38	191	"	C	134	438	"	PC	88	142	"	A	190
285	"	P	15	568	1947	B	65	194	"	M	118	440	"	O	206	143	"	M	102
287	"	M	86	575	"	N	176	195	"	N	161	446	"	L	265	145	"	S	104
296	1947	A	142	577	"	PC	72	213	"	M	95	448	"	M	297	147	"	M	187
298	1948	S	1	581	"	N	192	214	"	O	139	451	"	Pesh	15	148	"	A	173
301	1947	A	97	583	"	A	74	218	"	P	116	454	"	S	81	150	"	L	220
303	1948	N	20	590	"	O	161	220	"	M	100	456	"	C	159	158	"	M	156
307	1947	L	13	592	"	P	146	221	"	A	24	461	"	B	135	159	"	L	249
320	"	C	1	599	"	S	130	222	"	B	92	466	"	N	231	162	"	S	84
332	"	M	5	604	"	A	109	224	"	P	131	469	"	M	104	173	"	A	60
343	1948	P	5	609	"	A	123	225	"	A	22	471	1948	N	19	175	"	B	264
346	1947	B	84	611	1948	C	95	227	"	P	62	473	1947	A	211	178	"	P	252
348	"	P	47	613	"	A	17	228	"	M	99	476	"	O	172	182	"	B	149
352	"	O	162	621	1947	B	161	229	"	O	159					185	1948	N	65
353	"	M	76	623	"	P	59	232	"	B	88					187	1947	O	106
230 I C				230 I C				230 I C				231 I C				231 I C			
IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R
373	1948	C	97	1	1947	PC	66	233	"	M	90	1	1947	PC	78	203	"	O	164
379	1947	P	283	2	"	O	104	235	"	C	145	5	1948	O	107	215	"	L	262
380	"	PC	53	15	"	M	84	239	"	A	16	6	"	N	52	219	"	O	418
388	"	P	60	17	"	B	82	241	"	N	180	10	1947	P	134	222	"	B	465
391	"	B	72	20	"	S	57	252	"	B	94	13	"	O	149	228	"	Pesh	19
394	"	P	78	22	"	B	75	255	"	M	92	14	"	P	161	232	"	C	260
398	"	M	60	23	"	A	14	257	1948	C	104	16	"	B	152	243	"	P	208
400	"	A	57	25	"	O	232	259	1947	M	117	17	"	P	199	248	"	M	195
402	"	N	17	27	1946	L	177	260	"	S	63	20	"	L	256	249	"	P	193
412	"	B	59	31	1947	B	77	261	"	M	98	24	"	N	236	254	"	B	409
419	"	C	97	37	1948	S	109	262	1948	P	122	27	"	O	235	259	"	M	120
420	"	PC	87	39	1947	P	181	267	1947	A	91	38	"	Pesh	18	260	"	B	187
421	1948	O	54	48	"	B	463	268	"	M	114	39	1948	O	125	263	"	M	161
447	1947	M	461	50	"	O	174	271	1948	O	47	41	1947	M	174	264	"	B	438
451	1948	P	75	60	"	C	36	272	1947	B	151	42	1947	O	19	270	"	C	176
454	"	C	6	65	"	B	87	273	"	C	119	44	1948	O	128	273	"	M	111
457	"	P	79	66	1948	N	70	274	"	P	81	45	"	C	103	275	"	A	186
464	1947	B	335	67	1947	B	86	285	"	"	115	48	1947	P	191	276	"	M	68
466	"	M	321	69	"	M	82	287	1948	C	3	54	1948	O	31	277	"	B	190
469	"	"	325	70	"	C	132	288	1947	P	84	55	"	C	103	279	"	A	33
474	1948	P	84	73	"	L	168	295	1948	L	47	56	1947	PC	97	280	"	L	255
475	"	A	80	76	"	A	7	299	1947	P	113	58	"	S	98	281	"	A	98
477	1947	N	124	77	"	B	78	302	1948	C	5	61	"	A	31	282	"	B	140
482	"	P	99	80	"	PC	32	304	1945	P	428	64	"	L	252	288	"	A	42
488	"	C	121	83	1948	N	50	311	1947	S	69	68	"	P	202	295	"	M	106
491	"	P	72	86	1947	S	59	321	"	A	165	72	"	A	63	299	"	B	160
493	1948	O	41	88	"	P	185	324	"	O	204	74	"	L	259	300	"	M	130
495	"	C	8	94	"	S	34	327	"	A	149	75	"	M	188	302	"	B	153
499	1947	N	178	95	"	B	71	331	"	B	325	76	"	A	59	305	"	M	127
501	"	M	94	99	"	P	152	334	"	O	204	78	"	M	74	308	"	B	156
502	"	PC	1	111	"	M	134	337	"	PC	60	80	"	A	81	310	"	A	89
511	"	N	247	113	"	B	90	344	"	C	75	82	"	S	79	311	"	B	157
								357	"	M	96	83	"	A	169	313	"	P	277
								360	"	L	278	86	"	M	184	316	"	M	160
								363	1948	C	14		"	PC	75	318	"	P	249

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Lahore High Court

A. I. R. (35) 1948 Lahore 1 [C. N. 1.]

MARTEN AND TEJA SINGH JJ.

Sm. Attar Kaur—Plaintiff—Petitioner v. Lala Gopal Das and others — Defendants — Respondents.

Civil Miso. No. 149/C of 1946, Decided on 16-10-1946.

(a) Civil P. C. (1908), S. 110—Decree of affirmance—Test.

The true test as to whether the decree of the High Court is a decree of affirmance is to see whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the point or points left in dispute have been affirmed. Where the High Court affirms the findings of the Court below on some points but reverses it on others and the party intends to agitate in appeal to His Majesty in Council the findings of the High Court on all the points, the permission to appeal to his Majesty in Council must be granted though the appeal does not involve any substantial question of law: 28 A. I. R. 1941 Pat. 269 and 33 A. I. R. 1946 All. 262, *Rel. on*; 31 A. I. R. 1944 Lah. 329 (F.B.), 31 A. I. R. 1944 Lah. 458 (F.B.) and 12 A.I.R. 1925 P. C. 60, *Disting.*; 17 A.I.R. 1930 Lah. 102, *Ref.* [Paras 7, 9 and 14]

The High Court, in such a case, cannot direct that the appeal to His Majesty in Council be confined only to the points on which the High Court reversed the Court below. The appeal itself must be against the whole decree though it may be rested on an argument directed to special items: 13 A I R 1926 P. C. 93, *Rel. on.* [Para 14]

Annotation: ('44-Com) C. P. C. S. 110 Note 13 pts 6, 7.

(b) Civil P. C. (1908), O. 44, R. 1—Appeal to Privy Council.

Permission to appeal in *forma pauperis* to Privy Council can only be granted by their Lordships of the Privy Council and not by the High Court. [Para 15]

Annotation: ('44-Com) C. P. C. O. 44 R. 1 N 12 pt. 2.

Cases referred:—

1. ('45) I. L. R. (1945) 26 Lah. 156 : 31 A. I. R. 1944 Lah. 329:216 I. C. 33 (F.B.), *Brahma Nand v. Sanatan Dharm Sabha.*
 2. ('45) I.L.R. (1945) 26 Lah. 242: 31 A.I.R. 1944 Lah. 458: 218 I. C. 1 (F.B.), *Wahiduddin v. Makhan Lal.*
 3. ('24) 51 Cal. 969 : 12 A. I. R. 1925 P. C. 60 : 51 I. A. 319:86 I. C. 504 (P.C.), *Annapurnabai v. Ruprao.*
- 1948 L/1 & 2

4. ('41) 28 A. I. R. 1941 Pat. 269: 20 Pat. 459 : 195

I. C. 344 (S.B.), *Brajasunder Deb v. Rajendra Narayan*

5. ('29) 10 Lah. 688 : 17 A. I. R. 1930 Lah. 102: 122

I. C. 90, *Bansi Lal v. Gopal Lal.*

6. ('46) 33 A. I. R. 1946 All. 262 : I. L. R. (1946) All.

328:222 I. C. 240, *Mt. Jamna Kunwar v. Lal Bahadur.*

7. ('27) 6 Pat. 24 : 13 A. I. R. 1926 P. C. 93 : 53 I. A.

197: 98 I. C. 499 (P.C.), *Jowad Hussain v. Gendan*

Singh.

Kundan Lal Gosain—for Petitioner.

D. K. Mahajan and F. C. Mittal—for Respondents.

Teja Singh J.—This is a petition for leave to appeal to His Majesty in Council. In order to be able to understand the nature of the objections raised by the other side it is necessary to set out briefly the facts of the case. The petitioner Mussammat Attar Kaur, who was the plaintiff in the case, was the widow of Ganesh Das. Gopal Das, defendant 1, was Ganesh Das's brother. Mussammat Attar Kaur alleged that Ganesh Das was separate from his father and brothers, that he was possessed of considerable movable and immovable property and that he made a will whereby he bequeathed five shops, a house and Rs. 4000/- to her and in addition declared that she would be entitled to a monthly maintenance of Rs. 30/-. She further alleged that she owned gold jewellery weighing about 70 *tolas* in her own right, which she had entrusted to Gopal Das, that Gopal Das had also been managing the property that had been left to her by her husband on her behalf, but he never rendered to her an account of rents and profits. She asserted that she was told that the defendants were relying upon a decree that the Senior Subordinate Judge, Gujranwala, had passed in their favour on the basis of an award given by Lala Balla Mal, who was alleged to have been appointed as an arbitrator by her, Gopal Das and Khiraiti Lal son of Gopal Das, but contended that she had never been a party to an agreement to refer any matter to arbitration of Balla Mal and that the entire proceedings relating to arbi-

tration were void and inoperative for reasons mentioned in the plaint. The following five reliefs were claimed by her: (1) possession of five shops bequeathed to her by her husband, (2) a decree for monthly maintenance of Rs. 30/- on the basis of her husband's will, (3) a decree for Rs. 19,000/- on account of rent of the shop for a specified period and the arrears of maintenance etc. (4) a declaratory decree that she was entitled to reside in the house that had been bequeathed in her favour by her husband, and (5) a declaratory decree that the decree passed by the Senior Subordinate Judge on the basis of Balla Mal's award was null and void and was not binding upon her.

[2] The defendants joined issue with her on almost all the points and alleged *inter alia* that Ganesh Das was a member of a joint Hindu family with his brothers and father, that he had no separate property, that he neither could nor did make any will in the plaintiff's favour and that he had adopted Khiraiti Lal as his son and he alone was his heir.

[3] The trial Sub.Judge dismissed the suit with costs holding that the plaintiff was bound by the previous decree of the Senior Subordinate Judge, that Ganesh Dass constituted a joint Hindu family with his brothers and father, that the will relied upon by the plaintiff had not been proved and was not valid and that the plaintiff was not entitled to any relief against the defendants. From the decree dismissing the suit the plaintiff appealed to the High Court. We upheld the findings of the lower Court on the questions of adoption and will, but reversed it on other points. We held that Ganesh Das was not joint with his father and brothers and that the property, which stood in his name and of which he was the owner, was his separate property. We also held that the decree against the plaintiff based on Balla Mall's award having been obtained by fraud was inoperative and she was entitled to a declaration that the same was not binding upon her. As regards the jewellery our finding was that the same had been deposited by the plaintiff with Ganesh Das and she was entitled to Rs. 2100 on account of its price. According to Balla Mall's award and the previous decree of the Senior Subordinate Judge the defendants were liable to pay to the plaintiff a maintenance of Rs. 20 per mensem. The lower Court did not grant any relief to the plaintiff on account of maintenance in the present case. Our view was that since Khiraiti Lal was Ganesh Das's adopted son and heir and the entire property of the latter had devolved upon him he was legally bound to maintain her for her life time and we fixed the amount of monthly maintenance at the rate of Rs. 60. In the result, we

allowed the appeal in part and granted the plaintiff a decree to the following effect :

(1) a decree for declaration that the decree passed by the Senior Subordinate Judge, Gujranwala, on 17-4-1930, in her favour and against Gopal Das and Khiraiti Lal in the terms of Balla Mal's award does not bind her;

(2) a decree for declaration that the plaintiff is entitled to reside in the house mentioned in para. 5 (10) of the plaint for her life;

(3) a decree that the defendants shall pay her for her life a maintenance at the rate of Rs. 60 per mensem from the date of the suit; and

(4) a decree for Rs. 2100.

We laid down that the decree for Rs. 2100 in so far as it related to defendants 3 and 4 was payable out of the assets of Khiraiti Lal and the amount of maintenance would be a charge on the entire property that belonged to Ganesh Das and which stood in his name whether jointly or individually with Gopal Das. It may here be mentioned that the plaintiff brought her suit in *forma pauperis* and she was also allowed to appeal as a pauper. In view of the fact that she did not succeed on all the points we left her to bear her own costs throughout, but ordered that the court-fees both in the trial Court and in this Court would be recovered from the defendants.

[4] The plaintiff is the petitioner before us. The grounds of appeal attached to her petition go to show that she does not intend to confine her appeal only to the quantum of maintenance or the value of the jewellery which, according to her, is much below the amounts to which she is entitled in fact and in law, but she also intends to question the findings of this Court on the points in which we agreed with the trial Court.

[5] It was first of all argued by Mr. D. K. Mahajan, learned counsel for the respondents, that notwithstanding the fact that we did not uphold the trial Court on all the points in issue, the decree passed by us was virtually a decree of affirmance and since the appeal does not involve any substantial question of law no permission can be granted by virtue of the last paragraph of S. 110, Civil P. C. In support of his contention he referred us to I. L. R. 26 (1945) Lah. 156¹ and I. L. R. 26 (1945) Lah. 242;² 51 Cal. 969³ and a number of other cases. The first case related to a suit under S. 92, Civil P. C. The plaintiffs claimed accounts for six years as well as the removal of the defendant from the position of the trusteeship of the suit property. The main contest ranged round the question whether the property was a public trust or not. The trial Court came to the conclusion that it was and consequently granted a decree to the plaintiffs removing the defendant from the trusteeship of the property and appointed a new trustee for the management thereof. It also made a preliminary decree directing accounts to be taken in respect of the

income and expenditure of the property. The defendant appealed to the District Judge from the decree of the trial Court but failed. Then he preferred a second appeal to the High Court. In the High Court the plaintiffs respondents with a view to cut short the controversy abandoned their relief in respect of accounts, but contested the appeal on the remaining issues. The High Court maintained the concurrent findings of the Courts below as regards the nature of the property and accordingly dismissed the appeal so far as that matter was concerned. It, however, varied the decrees of the Courts below on the question of accounts in review of the plaintiff's statement abandoning that relief. On an application for leave to appeal to His Majesty in Council the defendant petitioner contended that though no substantial question of law was involved in the case he was entitled to appeal to His Majesty in Council as the decree by the High Court was not of affirmance and the value of the subject matter of the suit was over Rs. 10,000. Din Mohammad J., who wrote the main judgment of the Full Bench, discussed the leading cases including 51 Cal. 969³ and after pointing out that there was a great divergence of authority on the point involved and though 51 Cal. 969³ was the basic decision it had not been uniformly interpreted in the various High Courts in India, observed that the question as to what their Lordships of the Privy Council really intended to lay down in 51 Cal. 969³ was not easy to answer. In the circumstances, he held, one could venture to act upon one's own judgment and "this being so, with all respect to the learned Judges who granted the leave in the case cited above, I consider that the refusal of leave in such cases is more reasonable than its grant."

[6] Later on while he came to the facts of the case before him he said :

"Be that as it may, the present application is clearly distinguishable on facts from all those cases where a contrary view has been taken. Here, as already explained, the respondents had of their own accord withdrawn their relief in respect of accounts and consequently any variation that followed in the decree of this Court was not the result of an adjudication by this Court but of the parties' own action The decree of this Court was therefore to all intents and purposes a decree of affirmance within the meaning of S. 110, Civil P. C., and inasmuch as the applicant had conceded that no substantial question of law is involved as regards that part of the decree, no appeal lies as of right to His Majesty in Council."

So this case is quite distinguishable from the present case.

[7] The point decided in the second case (I. L. R. 1945 Lah. 242²) was quite different and all that was held by the Full Bench was that for the purposes of S. 110, Civil P. C., a decree

or order to be appealed from, where it partly maintains the decision of the Court immediately below and partly reverses it, is deemed to be one of affirmance when the subject matter of the appeal to His Majesty in Council is confined only to that part of the decree or order which affirms the decision of the Court below on that matter. In the present case, as mentioned above, the plaintiff intends to agitate in appeal the findings of this Court on all the points including those on which it reversed the trial Court.

[8] A word now about the facts of the Privy Council case, 51 Cal. 969.³ The property in dispute in that case belonged to one Shanker Rao Patel, who had died leaving behind two widows. The plaintiff brought a suit for possession of half the property alleging that he had been adopted by the senior widow. Defendant 1 was the junior widow of Shanker Rao Patel and defendant 2 claimed to have been adopted by her. Both the defendants denied the plaintiff's claim, urged that defendant 2 had been adopted by defendant 1 and maintained that the suit was barred by time. In addition defendant 1 claimed that she was entitled to Rs. 3000 per annum as maintenance out of the estate. The trial Court found for the plaintiff on the questions of his and defendant 2's adoption. It was further found that the suit was within time, but held that the plaintiff was bound to provide maintenance for defendant 1 at the rate of Rs. 800 per annum. Upon appeal the Court of the Judicial Commissioner modified the trial Court's decree by increasing the maintenance from Rs. 800 to Rs. 1200, but affirmed it in all other respects. The defendants' application to the Judicial Commissioner for leave to appeal to the Privy Council was dismissed on the ground that the decree of the first Court had been affirmed except in respect of a small change in favour of one of the applicants, and that no question of law was involved. They then approached their Lordships of the Privy Council for special leave. Sir George Lowndes, who appeared for the petitioners, urged that they had a right of appeal under Ss. 109 and 110, Civil P. C., and since the appellate Court did not affirm the decree of the first Court but varied it, it was not material under S. 110 whether any substantial question of law was involved. Towards the end he stated that having regard to the concurrent findings the petitioners desire to appeal only with regard to the amount of the maintenance. Nobody appeared for the respondent. Lord Dunedin while advising His Majesty that special leave to appeal should be granted made the following observations:

"In the opinion of their Lordships the contention of the petitioners' counsel as to the effect of S. 110 of the

Code is correct. They had therefore a right of appeal. Special leave to appeal should be granted, but should be limited to the question of maintenance. The petitioners' chance of success is not material to their application."

[9] Some of the important cases in which the interpretation put upon the observations of their Lordships was similar to that of Din Mohammad J. have been noted by him in his judgment. The leading case wherein the contrary view was taken is A. I. R. 1941 Pat. 269⁴ decided by a Special Bench consisting of Harries C. J., Fazal Ali and Manohar Lal JJ. The following are the observations made by Harries C. J. who delivered the judgment of the Special Bench:

"There can be no question that the point involved in this case is a difficult one and there is a conflict of decisions of this Court, but in my judgment the true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute has been affirmed by the High Court."

The learned Chief Justice pointed out:

"It is true that leave to appeal was limited to the question of maintenance, but it is to be observed that counsel stated that his clients desired leave to appeal only upon that issue. Lord Dunedin does not in terms confine his observations to this question of maintenance. He expressed the view that the petitioner's contention as to the effect of S. 110 of the Code was correct and that as the value of the suit and the subject matter of the proposed appeal exceeded Rs. 10,000 the petitioners had an appeal as of right by reason of the fact that the appellate Court did not affirm the decree of the first Court."

Towards the end his Lordship observed that the true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute has been affirmed by the High Court. He pointed out that the difficulty arises owing to the use of the phrase 'the decision of the Court immediately below the Court passing such decree' and had the words 'decree of the Court below' been used, the matter would have been clear. He held that the expression 'the decision of the Court immediately below the Court passing such decree' means the same as the expression 'decree of the Court below'. He said:

"Once an appeal has been decided, the decree of the Court below is merged in that of the appellate Court and strictly there is no longer in existence a decree of the trial Court. There is only a decision, and in my view the word 'decision' means the decision of the trial Court taken as a whole."

[10] Of the Lahore cases only two appear to be in point. The first is I. L. R. 10 Lah. (1929) 688.⁵ The parties referred the matters in dispute to arbitration and the award of the arbitrator was that the defendant should give possession of a certain factory to the plaintiff within a fixed time and in default should pay him Rs. 13,000. The defendant objected to the validity of the award. The objections were dismissed, but

since the time for delivery of possession had expired the Court considered it unnecessary to incorporate in the decree a direction relating to the delivery of the factory and granted the plaintiff a decree only for Rs. 13,000. On appeal by the defendant to the High Court the decree of the trial Court was modified to bring it into conformity with the award. The defendant applied for leave to appeal to His Majesty in Council. It was held that since the High Court had affirmed the decision of the trial Court in substance and the alteration made by it in the decree was not of a substantial nature, leave to appeal could not be granted.

[11] The second is a decision of another Division Bench in C. M. No. 148/C of 1945 to which I was a party. In that case the plaintiff brought a suit that he was a Sajjada Nashin of a certain shrine and as such he was entitled to certain rights. The lower Court found against him on all the points and dismissed his suit. On appeal this Court affirmed the decree of the lower Court on most of the points and held that he was not a Sajjada Nashin of the shrine. At the same time it came to the conclusion that the plaintiff was entitled to attend the annual Urs of the shrine accompanied by 100 persons and had to be accommodated in a part of the shrine and accepted his appeal to the extent that it granted him a decree for the declaration. The defendant applied for leave to appeal to the Privy Council. It was held that the value of the subject matter of appeal and suit being more than Rs. 10,000 the plaintiff was entitled to prefer an appeal to His Majesty in Council as a matter of right.

[12] The latest decision of the Allahabad High Court is A.I.R. 1946 ALL 262.⁶ The learned Judges followed the Patna case and distinguishing 26 Lah. 156¹ held that where an appeal to the High Court relates to a number of items of property and the appeal is accepted with regard to some of the items and dismissed with regard to the remaining items and the appellant proposes to appeal to the Privy Council in regard to such remaining items, the decree of the High Court cannot be treated as one of affirmance for the purpose of S. 110 of the Code notwithstanding that the proposed appeal to the Privy Council relates to a portion of the High Court's decree which has not been reversed or varied by the High Court, but has been maintained by it. Towards the end of their judgment the learned Judges observed that an appeal is a valuable right and a party is, unless there are insuperable barriers in the way, entitled to have the benefit of the mature and—considered judgment of the highest tribunal in the realm, an observation with which I respectfully agree.

[13] Then it was urged by Mr. D. K. Mahajan that since there was no definite issue on the question of maintenance and since the lower Court did not give any definite finding thereon it cannot be said that the High Court by awarding maintenance to the plaintiff at the rate of Rs. 60/- per mensem reversed the decree of the trial Court. I do not find any force in the objection. No doubt the five reliefs mentioned above were the only reliefs that the plaintiff specifically claimed, but she had also prayed that in case none of those reliefs could be granted to her she might be awarded any alternative or additional relief, other than the ones claimed by her. Reference in this connection may be made to cl. 6 of the last para. of the plaint. It may also be mentioned that according to R. 7 of O. 7, Civil P. C. it was within the power of the Court to grant her any appropriate relief to which she was entitled, notwithstanding the fact that the plaint did not contain any prayer about it. But the trial Court granted her no relief whatever and dismissed the suit. This Court on the other hand awarded her a decree embodying certain reliefs including maintenance and the price of the jewellery. I cannot, therefore, understand how the fact that the question of maintenance was not put in issue can make the decree of the High Court as the decree of affirmance. But even if we ignore the finding of the High Court as regards maintenance there is the question relating to the value of the jewellery which was put in issue and though it was found against the plaintiff by the trial Court, this Court decided it in her favour. It cannot, therefore, be denied that the decree of this Court in that respect at least did not affirm the decree of the trial Court.

[14] Last of all it was urged by Mr. D. K. Mahajan that we should direct that the plaintiff's appeal to the Privy Council be confined only to the point on which we reversed the trial Court. I cannot understand how we can do this, as was pointed out in the Patna case noted above an appeal must be preferred against the whole decree and not against any item or items in the decree. This view is supported by the observations made by Viscount Dunedin in 6 Pat. 24,⁷ that an appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree, and the decree alone. I, therefore, hold that the plaintiff is entitled to appeal to His Majesty in Council and permission for the appeal must be granted.

[15] It was also prayed by the plaintiff that she should be allowed to appeal in *forma pauperis*. But her counsel concedes that such a permission could only be granted by their Lord-

ships of the Privy Council. In the circumstances of the case there will be no order as to costs of this petition.

Marten J.—I agree.

D.H.

Permission granted.

A. I. R. (35) 1948 Lahore 5 [C. N. 2.]

ACHHRU RAM J.

Ganga Singh and another—Defendants—Appellants v. Jhandasingh, Plaintiff and another, Defendant—Respondents.

Second Appeal No. 31 of 1946, Decided on 4-11-1946, from order of Ex-officio Addl. Dist. Judge, Amritsar, D/- 22-11-1945.

Punjab Pre-emption Act (1 [I] of 1913), S. 20 — Pre-emption — Right of — Waiver.

Where a pre-emptor who holds a mortgage over the land sold, accepts the mortgage money without expressing his intention to enforce his right of pre-emption, his conduct does not amount to waiver so long as the period of limitation for the suit has not expired: 11 A. I. R. 1924 Lah. 159, *Foll.*; 154 P. L. R. 1906, *Not foll.* [Para 1]

Cases referred :—

1. ('06) 154 P. L. R. 1906, Mehta Chandras v. Malik Itbar Khan.
2. ('24) 11 A. I. R. 1924 Lah. 159 : 69 I. C. 648, Kanshi Ram v. Bhojaram.

Harnam Singh — for Appellants.

Roop Chand — for Respondents.

Judgment. — The only question in the present second appeal is whether the plaintiff Jhanda Singh should be deemed to have waived his right of pre-emption by reason of his accepting, about six months after the sale, payment of the mortgage money amounting to Rs. 260 and having redeemed the mortgage without any reservation of his right to sue to pre-empt the sale. The learned counsel for the appellants relies on a judgment of a Division Bench of the Punjab Chief Court in 154 P. L. R. 1906.¹ This judgment undoubtedly supports the contention of the learned counsel. However, in a later case a Division Bench of this Court seems to have taken a contrary view. In A. I. R. 1924 Lah. 159,² the plaintiff was a mortgagee with possession of some of the land sold and mortgagee without possession of certain other parts of it. Subsequent to the sale he had received the moneys due to him as mortgagee from the vendee without any protest and without expressing any intention of enforcing his right of pre-emption. This conduct on his part was held not to amount to waiver of his pre-emptive right. With all respect, I agree with the view taken by the Division Bench of this Court by which I am, otherwise, bound and follow it in preference to that taken by the Division Bench of the Chief Court in 1906. A mortgagee cannot, merely on account of his possessing a superior pre-emptive right, refuse to receive the mort-

gage money from a person who has purchased the property covered by the mortgage and to redeem the mortgage. As regards the failure of the pre-emptor to make any reservation in favour of his right to sue to pre-empt the sale at the time of receiving the mortgage money, I cannot see on what principle he can be held to have waived his right of pre-emption on account of such failure. A pre-emptor can wait up to the last day of limitation prescribed for a pre-emption suit and is not required to consider whether he would bring such a suit at any time before that. He is under no obligation to make up his mind to bring a pre-emption suit at any particular time before the expiration of the period of limitation for the suit. His failure to express any intention of enforcing his right of pre-emption at the time of receiving the mortgage money due to him under a mortgage of the land sold can at best show that up to that time he had not yet decided whether he would bring a pre-emption suit or not. In order to constitute waiver of his pre-emptive right, it must appear that he had made up his mind not to sue to enforce that right and, in some way or another had given expression to an intention not to do so. For the reasons given above, I see no force in this appeal and dismiss the same with costs.

K.S.

*Appeal dismissed.***A. I. R. (35) 1948 Lahore 6 [C. N. 3.]****SPECIAL BENCH****TEJA SINGH, BHANDARI AND RAHMAN JJ.***In the matter of "Jang-i-Azadi, Lahore — Petitioner.*

Criminal Original No. 28 of 1946, Decided on 3-3-1947, against order of the Punjab Govt., D/- 18-10-1946 and Dist. Magistrate, Lahore, D/- 25-10-1946.

(a) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Government established by law in British India — Handful of officers, if Government.

A handful of Government officers cannot be regarded as "Government established by law in British India" within Cl. (d) of S. 4 (1). Hence a general criticism of certain officer or officers cannot be deemed to be a criticism of the "Government established by law in British India": *Case law referred.* [Paras 5 and 6]

(b) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Attacks on individual police officers.

Attacks on individual police officers do not bring into hatred or contempt either the Government established by law in British India or any class or section of His Majesty's subjects: 19 A. I. R. 1932 Cal. 649 (S.B.), and 10 A. I. R. 1923 Lah. 61, *Ref.*; 21 A. I. R. 1934 Lah. 219, *Disting.* [Para 7]

Obiter.—Per Bhandari J.—The entire police force of a province cannot be said to be a class or section of his Majesty's subjects within the meaning of S. 4 (1) (d): *Dissenting view of Agha Haidar J.* in 21 A. I. R. 1934 Lah. 219 (S. B.), *Approved.* [Para 7]

(c) Press (Emergency Powers) Act (1931), S. 4 (1) (f) — Newspaper article constituting endeavour to promote public disorder.

Where an article constitutes a malicious endeavour to promote public disorder and tends to incite people immediately to take other than legal action to secure an alteration of what the Government has in charge, it offends against the provisions of cl. (f) of S. 4 (1). [Para 7]

(d) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Criticism of Government — When does not amount to sedition — Penal Code (1860), S. 124-A.

The time is long past when the mere criticism of Government was considered sufficient to constitute sedition. The ruler in a democratic state is really the servant of the people and may well be criticised by them. So long, therefore, the criticism has no direct tendency to bring the Government established by law into hatred and contempt and so long as it does not induce the people to disobey the laws and to defy legally constituted authority, the offence of sedition cannot be said to be committed. Words which were formerly considered to be seditious are now accepted without demur as the inevitable result of the freedom of thought. (Hence calling bureaucrats thugs and profiteers was held not to amount to sedition.): 29 A. I. R. 1942 F.C. 22, *Foll.*; (1704) 1 How. St. Tr. 10, (1804) 29 How. St. Tr. 1 and (1909) 22 Cox C. C. 1, *Ref.*

[Paras 11 & 11a]

(e) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Criticism of doings of Ministers, if comes within clause.

Per Teja Singh J. — Under the present constitution the Ministers belong to one or more political parties and a criticism of their doings or policy, even if it be strongly worded, cannot be said to bring into hatred or contempt His Majesty's Government established by law in British India. [Para 17]

(f) Press (Emergency Powers) Act (1931), S. 4 (1) — Question whether article comes within subsection — Article must be read as whole.

Per Teja Singh J. — In order to find out whether or not a particular article is objectionable and whether it tends to produce a certain effect upon its readers, the Court must look at the whole of the article and not single out a few words or sentences here and there.

[Para 19]

(g) Press (Emergency Powers) Act (1931), S. 4 (1) — Forfeiture—Single sentence obnoxious to subsection.

Per Teja Singh and Rahman JJ. — Even a single sentence, if obnoxious to S. 4 (1) entails forfeiture of the security and it is not open to the Court to apportion punishment or to reduce the penalty on any other ground. 18 A. I. R. 1931 Lah. 283, *Foll.* [Paras 20 & 27]

(h) Press (Emergency Powers) Act (1931), S. 4 (1) (d).

Rajas and jagirdars form a section of His Majesty's subjects and if an article tends to bring them into hatred or contempt, it would be covered by cl. (d) of S. 4 (1). [Para 28]

(i) Press (Emergency Powers) Act (1931), S. 4 (1) (a) and (f) — Passages in articles in newspaper held came within S. 4 (1) (a) and (f).

The Govt. having interfered with the flow of canal water the kisans organised themselves into a Jatha and went to the office of Canal Department to have their grievances redressed. There they were beaten by the police. The editor of a newspaper which was subscribed by 1500 persons supporting the movement of the kisans wrote certain articles. In a small verse the kisan was made to say (a) "for resisting tyranny I will join the Morcha. For taking water to which I am entitled I will

suffer imprisonment and lathi charge and mount the gallows. What if my home and hearth are destroyed, I will fight in the forefront with my comrades. (b) "I will return home after uprooting imperialism and feudalism and throwing these across the seas. I will catch those tyrants who practised untold repression on the public and sew them in skins" (c) "Making common cause with the public I will enkindle the fire of unity and will burn the forehead of the wretched Government."

Held that (1) the words in passage (a) encouraged or incited the kisans to interfere with the maintenance of law and order and were repugnant to the provisions of S. 4 (1) (f). [Para 9]

(2) Per *Bhandari and Rahman JJ.*—The words in passage (b) had the effect of encouraging people to commit crimes of violence and therefore fell within the ambit of S. 4 (1) (a). [Paras 10, 20 & 28]

Per *Teja Singh and Rahman JJ.*—The said words also fell within the ambit of S. 4 (1) (f).

(3) The words in passage (c) merely expressed the popular saying that "union is strength" and was not designed to incite people to violence. [Para 11]

(j) Press (Emergency Powers) Act (1931), S. 4 (1) (b) — Women defending themselves against high handedness of police — Expression of approval of conduct of women if objectionable.

An article in a newspaper expressing approval or admiration of the conduct of certain women in defending themselves against the high-handedness of police in exercise of the right of private defence was held not open to objection under S. 4 (1) (b) as it did not express approval or admiration of an offence involving violence. [Para 13]

Cases referred :—

1. ('98) 22 Bom 112, Queen-Empress v. Balgangadhar Tilak,
2. ('06) 8 Bom. L. R. 421, : 30 Bom. 421, Emperor v. Bhaskar Balwant.
3. ('24) 3 Lab. 405 : 10 A.I.R. 1923 Lah. 61 : 71 I. C. 519 (SB), Rajpal v. Emperor.
4. ('37) 24 A. I. R. 1937 Lah 513 : I. L. R. 1937 Lah 445 : 170 I. C. 439 (SB), Parkash Chand v. Emperor.
5. ('34) 149 I. C. 370 : 21 A. I. R. 1934 Lah 219 (SB), In the matter of "Zamindar".
6. ('32) 19 A. I. R. 1932 Cal 649 : 138 I. C. 849 (SB), In the matter of Janasakti of Sylhet.
7. (1704) 1 How St. Tr. 10, R. v. Tutchin.
8. (1804) 29 How St. Tr. 1, R. v. Cobbet.
9. (1909) 22 Cox C C 1, R. v. Alfred.
10. ('42) 29 A. I. R. 1942 F. C. 22 : 1942 F.C. R. 38 : I. L. R. 1942 Kar F. C. 56 : 200 I. C. 289 (FC), Niharendu Dutt v. Emperor.
11. ('31) 18 A. I. R. 1931 Lah 283 : 12 Lah 345 : 132 I. C. 889 (FB), Prithvi Das v. Emperor.

Khushwant Singh—for Petitioner.

Kartar Singh Chawla, A. L. R.—for the Crown.

Bhandari J. — On 18-10-1946, the Punjab Government issued an order under, S. 8, Indian Press (Emergency Powers) Act, 1931, declaring the security of Rs. 1,000 deposited in respect of the Punjab Weekly known as the "Jung-i-Azadi" of Lahore forfeited to the Crown. The petitioner S. Arjan Singh Gargaj, who is the publisher of the said newspaper, is dissatisfied with the order and has come to this Court under S. 23 of the Act of 1931.

[2] Early in the year 1946 the Punjab Government passed a general order to the effect that the dimensions of the outlets through which a large tract of land was being irrigated should be reduced. The consequent reduction in the supply of water caused very deep and widespread resentment amongst the zamindars who were prejudicially affected by the order and they accordingly organised themselves into a powerful body with the object of defying the order and demolishing the outlets. After the outlets had been demolished and the police had left the scene of the crime, the members of this organisation, known popularly as the Mogha Committee, decided to have the moghas restored to their normal dimensions. They accordingly presented themselves in large numbers at the office of the Irrigation Department at Amritsar. The local officers declined to reconstruct the outlets. The Punjabi Weekly "Jang-i-Azadi" thereupon took up cudgels for the zamindars and published the following three articles on the dates mentioned against them.

1. "*Kisan Morche da dusra daur:*
Siran te Khafan banhan da'
Vela'; Bhainan nun Badmash
Akhanwalian da bistra gol karo."
—2nd September 1946.
2. "*Kisan da Morcha.*"
—2nd September 1946.
3. "*Harse Chhine de Morche wich*
police da annaha tashaddad te
Kisan Sheran te Shernian da'
thekwan' jawab. Punjab de hor
Zilian te Riyastan ton we jathe."
—9th September 1946.

It is in respect of these articles that the security has been forfeited.

[3] The first article appeared under the following headings:

"SECOND PHASE OF THE Kisan Morcha."

"Time for tying shrouds on heads. Make those quit who call sisters as Badmash."
Dealing with the first phase of the Morchas which lasted from 16th July to 24th August, the author writes:

"During this period about 600 Kisans and Kisan workers were arrested. Warrants were issued against many a worker. The police hunted them from village to village. But several of them have not been arrested so far. The properties of some of them were attached with a view to terrifying the general public by creating alarm and panic. During this period the police belaboured the workers, insulted many respectable persons and thus committed a good deal of violence by harassing people indiscriminately."

[4] Dealing with the second phase, which commenced on 24th August, the author states:

"On the 26th August the first Jatha of Gharend under the leadership of Jathedar Mohan Singh Mohawa reached the office of the Canal Department. The Canal

Department refused to construct Moghas. The police under the Coalition Ministry encircled the Jatha in the office. In the presence of thousands of people the members of the Jatha were heavily beaten with long sticks furnished with iron ferrules till they were senseless and appeared as dead bodies. The Deputy Commissioner and the Superintendent, Police, were themselves leading and taking part in the beating. The said officers themselves took part in the beating of the brave and veteran Jathedar of the Jatha, Mohan Singh Mohawa. S. Massa Singh of Chhina, Bidhi Chand, Maqtool Singh, Lohari Mal, Puran Singh of Hosbiar Nagar and several other persons stood up again and again raised slogans and got themselves beaten till they were senseless. Each member of the Jatha set up new traditions of bravery, endurance and steadfastness.

This was not all. The Deputy Commissioner and the Superintendent themselves gave orders and got the ladies' Jatha beaten very mercilessly. Mai Hukam Kaur Chhina, Bibi Gurbachan Kaur and Bibi Mahnda, received so much beating that they began to bleed profusely. Some received injuries on their heads, some on their shoulders and some on their arms. When the officers were asked why they were beating them the Superintendent replied that they were *Badmash* women.

This new phase has commenced with extreme violence. The bureaucracy thought that the Jathas would be made to flee away by beating and the matter would end. But the bravery, endurance and steadfastness displayed by the Jatha defeated the bureaucracy. Now, they have begun to arrest the Jathas, belabour them and release them at far off places. In villages particularly in Chhina repression has been increased. The police has begun to indulge in beating too much. But the people are not silent. They will give a reply to this.

The Kisans of the Punjab will never forget the day of 26th August. They will fully remember the beating given on that day and the calling of our sisters as *Badmash* by a white man; they will keep this in their hearts till these white men humbly apologise to our sisters and mothers. Resolutions should be passed at every place against these white men that they should be made to sail off bag and baggage.

But remember that a young he-buffalo struts on the support of its peg. At their back are the Panthic Minister, S. Baldev Singh, and the Congress Ministers, Sachar and Lahri Singh. In fact these *dangs* (blows) have been given to us by these Ministers, and it is they who have called our sisters and mothers *Badmash*. The Kisans will not sit silent. They will take revenge when an opportunity arises.

Kisan Brothers Get up. It is not the time to waiver and falter. It is time to throw down the gauntlet and enter the field. It is not the time to wait for any one. But it is time to jump into the arena and show the Kisan dignity. Our dignity lies in the victory of the Kisan Morcha. Rise up, send Jathas from every village of 10, 15, 20 persons each to Amritsar. As soon as you rise up the Morcha is won.

Kisan, brothers. Call upon every Congress-man, Leaguer, and Akali and say unto them come and help us in the Morcha launched by the Kisans. Accompany us. The time has come to distinguish between friend and foe."

He whose sense of honour is not aroused even after this beating and after sisters are called *badmash*, whose blood does not boil, whose arms do not throb and who still does not come forward with red eyes and naked chest is a coward and poltroon. The Kisans consider him a lifeless body.

Brothers I gird up your loins. During the first phase we defeated the police, and demolished the Moghas. In the present phase we have to break those who want to break the Morcha. With the power of organization and

unity among the Kisans we have to silence the enemies. We have to display the miracles of our sense of sacrifice, fighting spirit and steadfastness. We have to get the Moghas restored. We have to end the loot, bribery and nepotism practised by Canal Officers. As soon as you take courage and are prepared to lay down your lives, we will be successful and victory will kiss our feet. Long live the Kisan Morcha."

[5] A perusal of this article makes it quite clear that the wrath of the author is directed (a) towards the local police who hunted the Kisans from village to village, insulted respectable persons and harassed the people indiscriminately; (b) towards the officers of the Irrigation Department who declined to reconstruct the outlets in accordance with the wishes of the Mogha Strike Committee; (c) towards the Deputy Commissioner and the Superintendent of Police who gave orders for *jathas* to be beaten mercilessly; and (d) towards the Superintendent of Police for calling members of the ladies Jathas *badmash* women. By no stretch of meaning can this handful of officers be regarded as "Government established by law in British India" within the meaning of the expression appearing in clause (d) of sub-section (1) of S. 4, Act of 1931. 22 Bom. 112,¹ 8 Bom. L. R. 421² at Page 438, 3 Lah. 405;³ A. I. R. 1937 Lah. 513.⁴ In A. I. R. 1937 Lah. 513,⁴ Tek Chand J. reviewed the various authorities bearing on this point and observed as follows:

"It will thus be seen that the consensus of judicial authority in India is against the interpretation of S. 124-A, Penal Code, and section of Press Act, contended for by the learned Government-Advocate. Indeed, his interpretation, if accepted, will lead to startling consequences. If that were the correct legal view, it would be indictable as sedition to criticise the policy or administrative acts of a particular officer or officers, e. g. the Executive Counsellors and Ministers of a Provincial Government under the existing constitution or the Ministry as a whole under the new constitution, if such criticism is couched in language, which brings, or attempts to bring into hatred or contempt, or excites disaffection towards these particular officers, singly or collectively, as distinguished from the system of Governments established in the country. I have no doubt that this is not the law, as in force in India. In this connection it might be useful to point out that the substantive part of S. 124-A, I. P. C., is substantially the same as the English Statutes dealing with seditions (60. Geo. III & I Geo. IV C. 8), where seditious libels have been defined."

[6] These authorities make it quite clear that a general criticism of a certain officer or of certain officers cannot be deemed to be a criticism of the "Government established by law in British India."

[7] But the question at once arises whether a scathing criticism of the police force of a province can be said to bring into hatred or contempt a class or section of His Majesty's subjects. Two diametrically opposite views have been taken. One view finds expression in the judgment of Addison and Monroe JJ. in 149 I. C. 370.⁵ The

learned Judges held that the police form a well-defined group of his Majesty's subjects :

"they comprise a very large body of men; they form a separable portion of the population of the country; they consist of a number of persons possessing common attributes and are grouped together under the name 'police'. They thus form both a 'section' as well a 'class' of His Majesty's subjects in British India The police form part of the Government established by law in British India as much as do the Magistrates, Judges and Secretaries."

They expressed the view that when the police as a whole are attacked and not individual officers, the words also tend directly or indirectly to bring into hatred or contempt the Government established by law in British India. A contrary view was expressed by Agha Haidar J. who was the third member of this Special Bench. Relying upon authorities to which a reference has already been made, the learned Judge came to the conclusion that the expression 'class or section' in clause (d) signifies large portions of the population of His Majesty's subjects in British India. He held further that those portions should be determined not by any artificial or official designation but by some natural or spontaneous process whereby large masses of population are grouped into separate categories. In other words he thought that :

"the expression as it occurs in the sub-section under consideration, refers to permanent and distinct elements of society which are to be found in the country and which exist and would continue to exist irrespective of any action of the Government. I have some such classification in my mind, Indians, Europeans, Hindus, Mohammedans, Christians, Sikhs, Jats, Rajputs, Parsees, Buddhists, etc., etc. I can also understand agricultural classes, working classes, upper classes, lower classes and so on The provisions of the Indian Press (Emergency Powers) Act, 1931, are of a penal character and, according to the well-recognised principles of construction, they should not be construed strictly to the detriment of the subjects."

I am inclined to prefer the view taken by Agha Haidar J. to that taken by the other two Judges. But it is not necessary for the purposes of this case to examine the relative merits of these different and conflicting views for I am satisfied that the author of this article did not set out to criticise the entire police force of the Province but only those members of the police force who were deputed to deal with the Morchas in the Majitha Sub-Division. There is an almost complete unanimity of opinion that attacks on individual police officers do not bring into hatred or contempt either the Government established by law in British India or any class or section of His Majesty's subjects. (A. I. R. 1923 Lah. 61;³ A. I. R. 1932 Cal. 649⁶). It seems to me, therefore, that however strong the criticism of the officers in this case was it cannot be brought within the mischief of sub-s. (1) of S. 4 of the Act of 1931. There is only one

passage in the article which can bring the article within the purview of S. 4 and that is the passage in which the author incites the Kissans to throw down the gauntlet, and to send *jathas* of 10, 15 or 20 persons from every village to break those who want to break the Morcha. The author is obviously inciting Kissans to interfere with the maintenance of law and order. In other words, this article constitutes a malicious endeavour to promote public disorder. It tends to incite people immediately to take other than legal action to secure an alteration of what Government has in charge. In my judgment, this paragraph offends against the provisions of clause (f) of sub-s. (1).

[8] The second publication to which objection has been taken by Government is a small poem which appears under the caption Kisan da Morcha. It runs as follows :

"Oh leonine peasant warrior ! Get up and just see. There is a fight over the water of your Moghas (canal outlets). The coalition Ministry (in office) by your votes, has marched upon your companions. They having belaboured your mothers and sisters and having made them march on after binding them have acted very high-handedly. What should I speak to you of the affairs—Matters have crossed the limit. Tyrants have flown the kite of tyranny high in the sky. Tell me Oh Comrades, whether you will be an idle spectator. The fight is for your dignity, honour and self respect. The world of the free is enjoying freedom. For you the police have brought Lathis and chains.

Kisan's reply.

On hearing this, the leonine Kisan says. For resisting tyranny, I will join the Morcha. For taking full water to which I am entitled, I will suffer imprisonment and Lathi charge and mount the gallows. What if my home and hearth are destroyed. I will fight in the forefront along with my comrades. I will not deviate from my path of freedom. I will catch bribery takers, thieves and profiteers. I will return home after uprooting imperialism and feudalism and throwing these across the seas, I will catch those tyrants who practised untold repression on the public and will sew them in skins. Making common cause with the public I will enkindle the fire of unity and will burn the forehead of the wretched Government.

Swearing by the red flag I say : Imperialism must be ended. Bureaucrats are Thags and profiteers a gang of thieves, the Rajas and Jagirdars are a party of dacoits. The henchmen of Imperialism like Baldev Singh, along with Rajas, will be given the handle of the grinding mill.

We have to win the Morcha challengingly (lit. by patting the thighs). Khizar will say aloud, Come to our rescue, come to our rescue. The leonine Kisan has won putting all the foxes to flight. We have suffered a defeat—our friend imperialism has been vanquished.

[9] A fair reading of this poem shows that it contains an incitement to the Kisans to fight for their "dignity, honour and self respect" by joining the Morcha. It tells them that the coalition ministry which was brought into office by their votes had belaboured their mothers and sisters, that tyrants had misused their powers and that the police had brought nothing but lathis and chains for the Kissans. Then follows

the Kissan's reply which must be read in conjunction with the author's exhortation. The Kissan says :

"For resisting tyranny I will join the Morcha. For taking water to which I am entitled I will suffer imprisonment and lathi charge and mount the gallows. What if my home and hearth are destroyed. I will fight in the forefront with my comrades".

There is no doubt in my mind that these words encourage or incite the Zamindars (sic Kisans?) to interfere with the maintenance of law and order and are thus repugnant to the provisions of clause (f).

[10] But worse follows. The Kissan then says :

"I will return home after uprooting imperialism and feudalism and throwing these across the seas, I will catch these tyrants who practised untold repression on the public and will sew them in skins".

The words "I will sew them in skins" speak for themselves. They are not metaphorical and cannot be overlooked on the ground of poetic licence. By using these words the author clearly advocates the murder of tyrants, i. e., the murder of all persons who practise tyranny. Such advice given to 1500 subscribers and to more than that number of readers of this paper has obviously the effect of encouraging people to commit crimes of violence. We in this country are painfully aware of the fact that certain elements in our population are only too willing to follow such advice. In my judgment these words fall clearly within the ambit of clause (a) of sub-s. (1).

[11] Then follow other verses :

"Making common cause with the public, I will enkindle the fire of unity and will burn the forehead of the wretched Government".

This verse merely gives expression to the popular saying that union is strength. It is not designed to incite people to violence. It is meant really to be metaphorical. Then follow other verses about Imperialism and about bureaucrats being *thugs* and profiteers. These words might have been declared to be seditious in the year 1704 when Lord Chief Justice Holt observed in 1 How St. Tr. 107.

"If persons should not be called to account for possessing the people with an ill opinion of the government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion of it".

These remarks were endorsed exactly one hundred years later by an even more distinguished Lord Chief Justice, Lord Ellenborough who asserted in (1804) 29 How. St. Tr. 1st that—

"It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy it is a crime".

This observation was made at a stage in the evolu-

tion of society when the right of people to share in the Government was not admitted and when even the mildest criticism of the ruler or of the government was considered to be a seditious libel. With the passage of time the right of people to share in the government has come to be fully recognised and autocratic forms of Government are being gradually wiped off the face of the globe. The change in the conception of political rights has brought about a corresponding change in the conception of the freedom of speech and at the present day the utmost toleration is accorded to expressions of abstract opinion. In (1909) 22 Cox C. C. 1,⁹ Coleridge J. directed the jury in the following terms:

"You are entitled to look at all the circumstances surrounding the publication with a view to seeing whether the language used is calculated to produce the result imputed; that is to say you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking if used to an assembly of professors or divines might produce a different result if used before an excited audience of young and uneducated men. You are entitled to take into account the state of public feeling. Of course there are times when a spark will explode a magazine A prosecution for seditious libel is some what of a rarity. It is a weapon that is not often taken down from the armoury in which it hangs but it is a necessary accompaniment to every civilized Government. The expression of abstract academic opinion in this country is free. A man may lawfully express his opinion on any public matter, however distasteful, however repugnant to others, if of course he avoids defamatory matter or if he avoids anything that can be characterized either as blasphemous or as an obscene libel. Matters of state, matters of policy, matters even of morals—all these are open to him. He may state his opinion freely, he may buttress it by arguments, he may try to persuade others to share his views. Courts and juries are not the judges in such matters. For instance, if he thinks that either despotism or an oligarchy, or a republic, or even no Government at all is the best way of conducting business affairs, he is at perfect liberty to say so. He may assail superstition, he may attack Governments, he may warn the executive of the day against taking a particular course He may seek to show that rebellions, insurrections, outrages, assassinations and such like are the natural, the deplorable, the inevitable, outcome of the policy which he is combating. All that is allowed because it is innocuous, but on the other hand if he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then whatever his motives, whatever his intention, there would be evidence on which a jury might, on which I think a jury ought, to decide that he is guilty of a seditious publication".

[11a] As pointed out by Gwyer C. J. in A.I.R. (29) 1942 F C 22¹⁰ the time is long past when the mere criticism of Government was considered sufficient to constitute sedition. The ruler in a democratic State is really the servant of the people and may well be criticised by them. So long, therefore, as the criticism has no direct tendency to bring the Government established by law into hatred and contempt and so long as

it does not induce the people to disobey the laws and to defy legally constituted authority, the offence of sedition cannot be said to be committed. Words which were formerly considered to be seditious are now accepted without demur as the inevitable result of the freedom of thought. I am of the opinion that the verses referred to in this paragraph are not actionable under S. 4 of the Act of 1931.

[12] The third article carries the following headings:

["Harse Chhine de Morche wich police da annah tashadad te Kisan Shern te Shernian da thokwan jawab".]

This article contains a recital of certain incidents in which the police are said to have acted illegally and to have practised violence on the Zamindars of village Harsa Chhine. The article shows up the policemen in a most unfavourable light but as pointed out elsewhere in this judgment, an attack upon certain Policemen who are placed on duty in a particular place cannot be said to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India.

[13] The only paragraph in this article to which serious objection has been taken is in the following terms:

"The stage at Chhina where meetings are daily held was captured by the police. On 28th day of August the police sat Dharna all the day long there. But the next day the women folk went there early in the morning and occupied it. The Sheikh, Sub-Inspector, who was emboldened by the previous day's happenings again came to the stage. He struck Bibi Basant Kaur with a ruler and pulled the pig-tail of Bibi Shakuntala Gargaj. It served as a signal and the crowd of women fell upon him. They caught him by the beard and gave slaps on his face. The lionesses threw him down on the ground. He felt ashamed and left the place. The stage remained in the possession of the women folk. Then a police constable angrily caught hold of Bibi Mahandan by the pigtail. What followed next: Down was the head of the foot constable, receiving Chapal blows from above at the hands of women."

It is said that this paragraph falls within the mischief of cl. (b) of sub-s. (1) inasmuch as it expresses approval or admiration of an offence involving violence of persons who have committed such offence. If the Sub-Inspector struck Bibi Basant Kaur with a ruler and pulled the pigtail of Bibi Shakuntala merely because they had occupied a place on the stage which was to be occupied by the Sub-Inspector, the women were not unjustified in throwing him on the ground. Similarly if a foot constable caught hold of Bibi Mahandan by the pigtail the women were not unjustified in doing what they did. Nothing is an offence which is done in the exercise of the right of private defence. It is true that S. 99, Penal Code, protects a public servant against the right of

private defence if such public servant is acting in good faith under colour of office, but can it be said that the two policemen who were roughly handled in this case were acting in good faith and under colour of office? If the facts have been correctly stated—and there being no affidavit to the contrary they must be assumed to be correctly stated—it seems to me that the women did not commit any offence involving violence. They did nothing more than defend themselves against the high-handedness of the police. It follows as a corollary that an expression of approval or admiration of the conduct of these women cannot render the article open to objection under cl. (b) of sub-s. (1) of S. 4 of the Act of 1931.

[14] For these reasons it seems to me that the first two articles of this newspaper contained words of the nature described in sub-section (1) of S. 4. The third article is, in my opinion, entirely innocuous. The petition must, therefore, be dismissed. I would make no order as to costs.

[15] **Teja Singh J.**—The Provincial Government issued a notice to the publisher of the Jang-i-azadi forfeiting the security of Rs. 1000 deposited by him in respect of the said newspaper because in the opinion of the Government the three articles published in the following two issues of the newspaper contained words which were of the nature described in cls. (b), (d), (f) and (h) of sub-s. (1) of S. 4, Press (Emergency Powers) Act 23 [XXIII] of 1931 read with S. 16, Criminal Law Amendment Act (23 [XXIII] of 1932):

(1) "*Kisan Morcha da dusra daur; Siran te Khafan benhan; 'vela; Bhainan nun Badmash Akhanwalianda bistra gol karo.*"

(2) "*Kisan da Morcha.* Both published in the issue of 2nd September, 1946, and (3) *Harse Chhina da Morcha wich police da annah tashadad te Kisan Shernan te Sharnian da thekwan jawab. Punjab de hor Zilian te Riyastan tem wi jathe.*" published in the issue of 9th September 1946.

[16] The petitioner has now moved this Court under S. 23, Press (Emergency Powers) Act (23 [XXIII] of 1931,) to set aside the order of the Provincial Government forfeiting the security.

[17] The articles are given *in extenso* in the judgment of my learned brother Bandari J. The first article is fairly lengthy and deals with two phases of the *morcha* or campaign started by peasants with the object of compelling the Provincial Government to enlarge the dimensions of the canal outlets. The first part of the article contains a strong criticism of the police officials who were deputed to suppress the campaign from 16th July to 24th August and the Coalition Ministry in the Punjab, but I do not

think that it can come within the ambit of any of the clauses of S. 4. Clause (b) which deals with "direct or indirect expression of approval or admiration of any offence or of any person who has committed any offence," has no application. Clause (f) would apply if the article contained any words, etc. tending directly or indirectly to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order or to commit any offence or to refuse or defer payment of any land revenue, tax, etc., payable to the Government or to any local authority and cl. (h) if the words of the article tended directly or indirectly to promote feelings of enmity or hatred between different classes of His Majesty's subjects. My opinion is that there are no words in this part of the article which are hit by these clauses. It was urged by Mr. Kartar Singh Chawla, learned counsel for the Crown, that since there was a strong attack upon the police and upon the Ministry, cl. (d) would come into action. In respect of the condemnation of the police the learned counsel relied upon A. I. R. 1934 Lah. 219⁵ but in that case the attack was directed against the whole police force while in the present article as I read it, only the doings of those police officers were criticised and condemned who were detailed for duty in connection with the morcha within a definite period. There is nothing on the record to show what the number of these police officers was but surely they could not constitute the entire police force in the province and I have no hesitation in holding that they cannot be regarded as a section of His Majesty's subjects within the meaning of clause (d). It was held in 3 Lah. 405³ that an attack on a few police officers cannot be regarded as an attack upon the Government. The same is the case with the attack upon Ministers. Under the present constitution the Ministers belong to one or more political parties and a criticism of their doings or policy, even if it be strongly worded, cannot be said to bring into hatred or contempt His Majesty's Government established by law in British India.

[18] The second part of the article contains a description of the second phase of the morcha which, according to the writer, commenced on 24th August. After relating what happened on 26th August and how the first jatha was beaten and maltreated, among others, by the Deputy Commissioner and the Superintendent of Police, and describing how the members of the jatha bore all the beating bravely it stated that when the officers were asked why they were beating the women the Superintendent replied that they were badmash women. Then followed the paragraph in which the violence indulged in

by the police was referred to. The words of the paragraph are :

"This new phase has commenced with extreme violence. The bureaucracy thought that the Jathas would be made to flee away by beating and the matter would end. But the bravery, endurance and steadfastness displayed by the Jatha defeated the bureaucracy. The police has begun to indulge in beating too much. But the people are not silent. They will give a reply to this."

In one of the subsequent paragraphs reference is made to the part played by the panthic Minister, S. Baldev Singh, and the Congress Ministers, Sachar (Mr. Bhim Sen Sachar) and (Cbaudhri) Lahri Singh. The concluding words of the paragraph are:

"These dang (blows) have been given to us by these Ministers and it is they who have called our sisters and mothers badmash. The Kisans will not sit idle. They will take revenge when an opportunity arises."

The last paragraph appears to be the most important:—

"Brothers! Gird up your loins — During the first phase we defeated the police, and demolished the moghas. In the present phase we have to break those who want to break the morcha. With the power of organisation and unity among the kisans we have to silence the enemies. We have to display the miracles of our sense of sacrifice, fighting spirit and steadfastness. We have to get the moghas restored. As soon as you take courage and are prepared to lay down your lives, we will be successful and victory will kiss our feet."

[19] I agree with Mr. Khushwant Singh, learned counsel for the petitioner, that in order to find out whether or not a particular article is objectionable and whether it tends to produce a certain effect upon its readers, we must look at the whole of the article and not single out a few words or sentences here and there. I have followed this rule in the present case and my opinion is that taking the second part of the article as a whole it encourages and incites the readers to interfere with the maintenance of law and order and to commit offences involving violence. It may be that it is not one of the worst specimens of writings of this kind, but nonetheless it is hit by clause (f).

[20] The second article consists of a small poem in Punjabi. It is divisible in two parts. The first consists of an exhortation to the "leo-nine peasant warrior" and asks him whether in spite of the various kinds of indignities heaped upon his mother, sister, etc., he "will be an idle spectator." The second part is the kisan's reply and inter alia the following words are put in his mouth :

"I will return home after uprooting imperialism and feudalism and throwing these across the seas, I will catch those tyrants who practised untold repression on the public and will sew them in skins."

Then he says :—

"Making common cause with the public I will enkindle the fire of unity and will burn the forehead of the

wretched Government. Bureaucrats are thugs and profiteers, a gang of thieves, the rajas and jagirdars are a party of dacoits. The henchmen of imperialism like S. Baldev Singh along with rajas, will be given the handle of the grinding mill."

I do not agree with the petitioner's learned counsel that these are mere innocent words having no meaning at all. As I read them, they are an invitation to violence, particularly so when it is to be remembered that the paper is meant for circulation among village people, a large majority of whom are illiterate and are very easily led astray. I am, therefore, inclined to think that this article is also hit by clause (f) of sub-s. (1) of S. 4. A part of it would come within the purview of clause (d) too, inasmuch as it tends to bring into hatred the rajas and jagirdars who are a section of His Majesty's subjects within the meaning of that clause. The argument that it is just a small poem and only a small part of it is objectionable does not deserve any consideration. According to S. 23 of the Act all that this Court has to decide is whether the article in question did or did not contain any words, etc., of the nature described in S. 4 of sub-section (1), and if it is found that it contains a single objectionable sentence the petition must be rejected. This view is supported by A. I. R. 1931 Lah. 283,¹¹ where it was held that even a single sentence, if obnoxious to S. 4, sub-s. (1), entails forfeiture of the security, and it is not open to the Court to apportion punishment or to reduce the penalty on any other ground.

[21] The third article describes the incident of 26th August and the parts played therein by certain police officers and some members of the *jatha*. In the absence of any affidavit on the part of the Crown that the description was erroneous in certain respects we must assume that it was correct. It was argued by Mr. Kartar Singh Chawla that the words used in describing the incident amounted to expression of approval or admiration of persons who had committed offences, but there is no force in this contention, because if the description is correct, and as I have already shown we must assume it to be correct, the persons who were alleged to have resisted or attacked the police were not the aggressors and they merely exercised the right of self defence. I cannot find any words in the article that attract the application of any of the clauses of S. 4, sub-s. (1).

[22] The result, in my opinion, is that the petition must be dismissed. There will be no order as to costs.

[23] **Rahman J.**—I have had the advantage of seeing the judgments proposed to be delivered in this case by my learned brothers, Teja Singh and Bhandari JJ. The facts of the case

have been sufficiently set out in their judgments and I need not reiterate them.

[24] The order passed by the Punjab Government forfeiting the security of the "Jang-i Azadi" was based on cls. (b), (d), (f) and (h) of sub-s. (1) of S. 4, Press (Emergency Powers) Act (23 [XXIII] of 1931) read with S. 16, Criminal Law Amendment Act of 1932, which were invoked in respect of three articles published in that paper. The first and the third are prose articles and the second is a poem.

[25] My learned brother Bhandari J. has expressed the opinion that a part of the first article which was calculated to incite the *kisans* "to send *jathas* to break those who want to break the Morchas" comes within the mischief of cl. (f) of sub-s. (1), of S. 4 of the Act. My learned brother Teja Singh J. has expressed a similar opinion about a part of this article. I am in respectful agreement with their views. The passages in question were clearly calculated to interfere with the maintenance of law and order and constituted an incitement to commit offences against the administration of the law.

[26] My learned brothers have concurred in holding that the third article, as it stands, does not offend against any clause of S. 4 of the Act. I find myself in agreement with this view. As was contended by Mr. Khushwant Singh on behalf of the petitioner this was a piece of objective reporting since the facts set out in that article were not challenged on behalf of the Crown. At the most it amounts to colourable writing up of incidents, showing how certain women who were mishandled by the police acted in the exercise of their right of private defence. As such it does not offend against the provisions of S. 4. The argument that the narration of alleged incidents in this form would indirectly encourage violence against police officers cannot be acceded to.

[27] With regard to the poem Bhandari J. has found that the first part is hit by cl. (f) of sub-s. (1) of S. 4 and another passage in the poem comes within the mischief of cl. (a) of sub-s. (1) of this section. I venture to point out that cl. (a) of sub-s. (1) was not relied upon in the notice issued by the Punjab Government to the publisher of the "Jang-i-Azadi", by which the security was forfeited, and Mr. Kartar Singh Chawla on behalf of the Crown also did not specifically refer to this clause when asked to state the case for the Crown. The words of cl. (a) of sub-s. (1) are very wide and as has been pointed out by my learned brother, the passage referred to by him would come within its purview. As however the Crown did not specifically rely on this clause, I think the point should not be laboured further. It is settled law that even if a part of the offending writing falls within the four

corners of S. 4, the order of forfeiture must be upheld, *vide* the dictum of Sir Shadi Lal C. J. in A. I. R. 1931 Lah. 283.¹¹

[28] The poem has also been analysed by my learned brother Teja Singh J. and he has expressed the view that it is hit both by cl. (f) and cl. (d) of sub-s. (1) of S. 4. The stanza in question described *rajas* and *jagirdars* as a party of dacoits. *Rajas* and *jagirdars* do form a section of His Majesty's subjects, as has been pointed out by my learned brother and the stanza in question tends to bring them into hatred or contempt. It would consequently be covered by cl. (d) of sub-s. (1). There is also a telling sentence in the poem reading as follows:

"I will catch those tyrants who practised untold repression on the public and will sew them in skins". Learned counsel for the petitioner tried to explain away these words as a mere poetic effusion not meriting serious consideration. I agree with my learned brother that the offending sentence comes within the mischief of cl. (f) of sub-s. (1) of S. 4.

[29] The result is that the order of forfeiture must be upheld and the petition dismissed. There should be no order as to costs.

V.R.B.

Petition dismissed.

A. I. R. (35) 1948 Lahore 14 [C. N. 4.]

ABDUL RASHID C. J. AND MAHAJAN J.

Dalip Singh v. Dongar Mal Shib Lal.

Second Appeal No. 1685 of 1944, Decided on 5-3-1947, from judgment of Abdur Rahman J., D/- 22-5-1946.

(a) Contract Act (1872), S. 213 — *Pacca arhtia*—Suit for accounts against.

The use of the word 'arhtia' in the term of 'pakka arhtia' is unfortunate. It gives an impression that a pakka arhti is always to be regarded as an agent. In law, however, he is not an agent but a principal. No suit by the constituent therefore lies against him for rendition of accounts: *Case law relied*; (1871) 6 Ch. A. 397 and 19 A. I. R. 1932 Lah. 633, *Disting.* [Para 5]

(b) Civil P. C. (1908), O. 6, R. 17—Amendment of plaint at conclusion of argument in second appeal was not allowed.

Where no request for amendment of plaint was made in the trial Court or in the lower appellate Court, and the opportunity given in the second appeal to put in a written application for the purpose was not availed of, the oral request for the amendment towards the conclusion of the argument in second appeal was refused. [Para 6]

Annotation: ('44-Com.) C.P.C., O. 6, R. 17, Note 13, Pts. 16 & 17.

Cases referred:—

1. ('40) 27 A. I. R. 1940 Lah. 195 : 189 I. C. 690, Balkrishen & Co. v. Ram Nath.
2. ('13) 15 Bom. L. R. 750 : 20 I. C. 882, Chogmal v. Jainarayan Kanbaiyalal.
3. ('37) I. L. R. (1937) 18 Lah. 683 : 24 A. I. R. 1937 Lah. 581 : 174 I. C. 827, Ganpat Mal Sunder Das v. Khehr Singh Balwant Singh & Co.

4. ('37) 24 A. I. R. 1937 Lah. 389 : 173 I. C. 444, Gopal Das Parmanand v. Mulraj.

5. ('32) 19 A. I. R. 1932 Lah. 633 : 139 I. C. 637, Jot Ram Sher Singh v. Jiwan Ram Sheoli Mal.

6. ('42) 29 A.I.R. 1942 Sind 115 : I. L. R. (1942) Kar. 38 : 201 I. C. 513, Ramgopal Parasram v. Uggersain.

7. (1871) 6 Ch. A. 397, Ex parte White.

8. ('44) 31 A.I.R. 1944 Bom. 325 : I.L.R. (1944) Bom. 696 : 221 I. C. 147 (S.B.), Superintendent of Stamps, Bombay v. Breul & Co.

Chiranjiva Lal Agarwal—for Appellant.

Faqir Chand Mittal—for Respondents.

Abdul Rashid C. J. — This appeal has arisen out of an action brought by Dalip Singh against Messers Dongar Mal Shib Lal for rendition of accounts. The allegations of the plaintiff were that he purchased through the defendants two kothas of gram and paid Rs. 1000 as earnest money. He further purchased 75 bags of rice through the defendants. In both of these transactions the defendants were acting as commission agents on behalf of the plaintiff. The balance of the purchase price was paid by the defendants themselves and the goods purchased for the plaintiff were stored in the godown of the defendants. After a short period of time the defendants sold these goods without the consent of the plaintiff and against his wishes. The defendants were thereupon called to render accounts relating to those goods. As the defendants had flatly refused to render accounts, the plaintiff was entitled to a decree for accounts relating to these goods against the defendants. The defendants pleaded, *inter alia*, that their dealings with the plaintiff were on the basis of the pakka arhtia system and the plaintiff was not, therefore, entitled to sue for rendition of accounts. It was open to the plaintiff to sue for a specific sum as the plaintiff was in a position by a simple arithmetical calculation, to institute a suit for an ascertained sum of money. The principal issue in the case was, whether the defendants acted as pakka arhtia and if so, whether the plaintiff was entitled to institute a suit for rendition of accounts. The trial Court held that the dealings between the parties were on the pakka arhtia system, and that, in consequence, the plaintiff was not entitled to sue for accounts. The dealings between the parties being as between principal and principal, it was open to the plaintiff to sue for a specific sum of money. It was further held that, in the circumstances of this case, it was easy for the plaintiff, by means of a simple arithmetical calculation, to determine the amount that was due to him. On these findings the plaintiff's suit for rendition of accounts was dismissed. The plaintiff was also unsuccessful on appeal in the Court of the senior Subordinate Judge of Hissar. He has, accordingly preferred a second appeal to this Court.

[2] The lower Court in coming to the conclusion that it was not open to the plaintiff to sue for accounts relied on a Single Bench decision of this Court reported in A. I. R. 1940 Lah. 195.¹ In this case, it was held that

"where an order has been given and accepted, the constituent and pakka arhtia stand to one another in the relation of principals; there is no relationship of principal and agent such as would justify a demand by the constituent of an account. The only claim which can be made by a constituent against a pakka arhtia is for a liquidated sum. The calculation of the sum in no sense involves accounting by the pakka arhtia; it is a matter of the application of simple arithmetical methods to facts within the knowledge of both sides."

It was contended by Mr. Charanjiva Lal Aggarwal, on behalf of the appellant, that the decision of the learned single Judge in A. I. R. 1940 Lah. 195¹ was not sound, and that the defendants in the present case were liable to render account to the plaintiff, even though the dealings between the parties were on the pakka arhtia system. In the Single Bench ruling reliance was placed by the learned Judge on a number of other decisions of this Court and the following quotation from 15 Bom. L. R. 750² was approved of:

"The legal relationship between the client and the Arhti is that of a vendor and purchaser whether the contract is written or oral or whether an order is sent by telegram and accepted by the Arhti As between him and his client the business is finished when an order for purchase or sale is accepted."

[3] The question of the legal relationship between a Pakka Arhti and his constituent was dealt with at some length by a Division Bench of this Court in 18 Lah. 683³ at p. 693. The following observations may be reproduced in extenso:

"Before considering these arguments, it seems necessary to bear in mind the incidents of the relationship between a Pakka Arhti and his client. And in this connection I cannot do better than refer to the lucid judgment of Macleod J. of the Bombay High Court in 15 Bom. L. R. 750², where it is pointed out that the legal relationship between the client and the Arhti is that of a vendor and purchaser, whether the contract is written or oral, or whether an order is sent by telegram and accepted by the Arhti, there is, however, this additional incident to the contract that the Arhti is entitled to charge commission and brokerage in addition to the price. It is also stated that in forward contracts entered into with a Pucca Arhti there is no obligation on his part to find buyers or sellers. As between him and his client the business is finished when an order for purchase or sale is accepted. Whether the Pucca Arhti takes the risk himself, or covers himself by selling again is entirely within his own discretion. The client cannot claim as of right the benefit of any covering contracts entered into on the same day as his sales, because no privity of contract exists between him and the opposite contracting parties, there being in fact no parties to the selling contract, but the client and the Arhti."

It is clear that the Single Bench ruling of Monroe J. receives strong support from the observations of the Division Bench in 18 Lah. 683.³ The learned counsel for the appellant, however, relied on a decision of another Division Bench

of this Court reported in A. I. R. 1937 Lah. 389.⁴ In this case it was held that:

"a Pucca Arhtia is an agent of his constituent only up to a certain point. It is the duty of the Pucca Arhtia to give a correct quotation of the price and for the purposes of quoting the price the Pucca Arhtia is an agent of his constituent. If, however, the rate quoted by the Pucca Arhtia is not incorrect and a transaction takes place between the Pucca Arhtia and the constituent, the transaction must be regarded as a contract between a principal and a principal. In the case of a Pucca Arhtia there is no privity between the constituent and the third party with whom the Pucca Arhtia deals. The Pucca Arhtia can make contracts with such parties or not as he pleases. If he makes contracts he can cancel them just as it suits him."

In my opinion, these observations are of no assistance whatever to the appellant. I have gone through the plaint in this case and there is not the slightest allegation therein that the defendants were guilty of giving an incorrect quotation so far as the price of gram or rice was concerned. According to the observations reproduced above, once a correct quotation has been given, the relation between a Pucca Arhtia and his constituent becomes that of principal and principal, and any transaction that may be entered into between the Pucca Arhtia and his constituent cannot form the subject-matter of a suit for accounts. The learned counsel for the appellant also relied on certain observations made at page 634 in A. I. R. 1932 Lah. 633.⁵ These observations are to the following effect:

"Both parties are agreed that delivery was intended and that the transactions were not of a wagering nature. They only differ as regards certain incidents of these transactions when they are effected through an agent who is known as Pucca Adatia. According to the defendants the position of Pucca Adatia is not that of an ordinary agent who merely brings about a transaction between third parties but that he becomes personally responsible and both the buyer as well as the seller look to him alone for the fulfilment of their contract. If the original seller fails to fulfil the contract the Pucca Adatia is bound to find the goods and give delivery or pay damages. If the buyer fails to take delivery the Pucca Adatia can claim damages from him; *vide* paras 5 and 6 of the Dastoor-ul-amal. The Pucca Adatia thus stands on a different footing from that of an ordinary commission agent. The learned counsel for the defendants-appellants conceded that their plea that the relationship between the parties was not at all that of principal and agent and that they were not liable to render accounts was too wide. What they really meant to say was that the agency being of the Pucca Adatia type as above the plaintiffs were not concerned with any party except the defendants and could look to them alone for the fulfilment of the contracts and consequently no question of accounts relating to their actual transactions with third parties arises in these cases."

After giving my careful consideration to the observations on which the learned counsel relied strenuously I have been unable to find that they assist his case in any manner. If the learned counsel appearing in the reported case conceded certain propositions of law it cannot be said that those propositions of law formed the

subject-matter of decision by the Court. This ruling was probably quoted as an instance that an account suit was allowed to proceed. If, however, no objection is taken by the defendants that an account suit is not competent the question cannot be said to have been raised and decided.

[4] It was held in (A.I.R. 1942 Sind 115⁶) that: "a Pucca Adatia is an agent of his constituent only up to a certain point. For the purposes of ascertaining and quoting price, the Pucca Adatia is an agent of his constituent. But after the price has been ascertained, and a transaction takes place, the Pucca Adatia ceases to be an agent and assumes towards his constituent the character of a principal, and the transaction must be regarded as a contract between principal and principal. There is no privity between the constituent and the third party with whom the Pucca Adatia deals. When under the terms of the contract the constituent cannot be brought into contractual relation with the third parties with whom the Pucca Adatia deals both the constituent and the third parties look to the Pucca Adatia as a principal."

[5] Some confusion has arisen from the fact that the word "Arhtia" can be translated into English as an agent. It is, therefore, assumed that an Arhtia, though he may be Pacca Arhtia, must throughout remain an agent and be liable to his principal for an account under S. 213, Contract Act. Though the words "Pacca Arhtia" may be translated as a 'commission agent' in fact he is not a commission agent in the true sense of the term. His contract with the constituent being a contract between principal and principal it is a misnomer to designate him by word "Arhtia". As, however, the use of this word is very common in Indian business circles, it has acquired a particular meaning and that meaning should not be confounded with the meaning of the word "agent" in the ordinary and popular sense of that term. The following observations from the judgment of Lord Justice James in (1871) 6 Ch. A. 397⁷ are of importance and may be reproduced in extenso :

"Now, whether these were trust moneys or not depends upon the relationship that existed between Messers Towle & Co, and Mr. Nevill. The business which Nevill carried on with the goods of Towle & Co. has been called a cotton agency business, and the word 'agency' in its *prima facie* sense seems to imply the relation of principal and agent, and not of vendor and purchaser; but it has been admitted in the course of the argument that there is no magic in the word 'agency'. It is often used in commercial matters where the real relationship is that of vendor and purchaser; and the question is whether the dealing between Mr. Nevill & Messers Towle & Co. with reference to these goods resulted in the relationship of vendor and purchaser, or in the relationship of principal and agent."

It is clear from the above quotation that even when a person is loosely called "an agent" he may either be a vendor or a purchaser though in common parlance he may be termed "a commission agent". It is for the Court to determine whether the relationship between the so-called

agent and principal was the relationship of vendor and purchaser or the relationship was that of principal and agent. This point has been brought out very clearly in a judgment of the Bombay Court in A. I. R. 1944 Bom. 325⁸ at p. 329. Mr. Justice Divatia made the following observations :

"Now by-law 81-A can be understood by reading it along with the previous by-law 81. Both these by-laws contemplate a transaction in which at least three persons are interested. A member can act as a broker but only as between two or more members. In that case under by-law 81, he shall not be liable as a principal provided certain specified conditions are fulfilled. A member can also act as what is described as a commission agent in a transaction on behalf of a member or a non-member, and in that case under by-law 81-A, he would have the rights and liabilities of a principal. In such a case his constituent shall not be entitled to enquire into the transaction between him and the third person with whom, for the purposes of his constituent's business, he contracts, so that there shall be no privity between the constituent and that third person and he shall be entitled to act in the transaction as he thinks fit without reference to his constituent. The effect of the two by-laws is that no non-member can be a party to a transaction in which a member acts merely as a broker or an agent but where he acts as a commission agent in a transaction on behalf of a member or a non-member, there is no privity between his constituent and another person with whom the member contracts for the purpose of his constituent's business. It would also follow from the two by-laws that where the transaction is between a member and a non-member as in the present case, the member must not be deemed to be a broker but a *commission agent or a principal*. A peculiar connotation is given to the term 'commission agent.' It is contrasted with the term 'broker' and is taken to mean a person who is other than a broker or a mere intermediary. This use of the term 'commission agent' for one who is not really an agent but a principal is indeed unfortunate. So also the words 'commission or brokerage' in the contract note are inappropriate when under by-law 81-A the term 'commission agent' is used as contrasted with a broker. However, the provision in the contract that it was entered into as between principal and principal 'notwithstanding anything herein contained' completely overrides all other apparently conflicting conditions and makes it clear that the transaction is not one of agency but of a direct buyer and seller. An agent is a person who acts for or represents another in dealing with a third person and as such he makes his principal answerable to such third person. Thus the test in law is whether a person is only an intermediary or acts on his own behalf. If he is not an intermediary, he is really a principal though he may be wrongly described as an agent."

In India also the use of the word "Arhti" in the term of "Pakka Arhti" is unfortunate. It gives an impression that a pakka arhti is always to be regarded as an agent. In law, however, he is not an agent but a principal. I would, therefore, hold that the plaintiff is not entitled to bring a suit for rendition of accounts against the defendants in the present case.

[6] The next point urged by Mr. Charanjiva Lal on behalf of the plaintiff was that he should be allowed to amend his plaint. No requests for amendment of the plaint was made in the trial

Court or in the lower appellate Court. In this Court, a request for amendment of the plaint was made before Abdur Rahman J., on 15-4-1946. Abdur Rahman J. passed the following order :

"If the appellant is serious about that prayer, he must make a separate application which will be, if made, heard and disposed of on its merits. The case may come up for hearing after a month."

No written application for the amendment of the plaint has been made so far, and it was only towards the conclusion of his arguments that an oral request to that effect was made by the learned counsel for the appellant. In this case it was possible for the appellant by means of a simple arithmetical calculation, to institute a suit for a liquidated sum of money. In view of all these circumstances, I am of the opinion that the appellant should not be allowed to amend his plaint at this stage.

[7] It was also stated that the terms of the contract between the parties and the mercantile custom prevailing in this Province entitled the plaintiff to institute a suit for accounts but these contentions were repelled by the lower appellate Court. No evidence has been placed on the record to show that the terms of the contract in the present case entitled the plaintiff to bring a suit for accounts. There is no evidence of any mercantile custom to this effect. For the reasons given above, I would affirm the decisions of the Courts below and dismiss this appeal with costs.

Mahajan J. — I agree.

R.G.D.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 17 [C. N. 5.]

ABDUL RASHID C. J. AND MAHAJAN J.

Brij Lal — Defendant — Appellant v. Mt. Mauli, Plaintiff and others, Defendants — Respondents.

Letters Patent Appeal No. 48 of 1946, Decided on 20-2-1947, from judgment of Mohammad Sharif J., in S. A. No. 429 of 1944, D/- 28-2-1946.

(a) Hindu law — Alienation — Alienation of family property by all adult coparceners — Legal necessity, presumption as to.

An alienation of the coparcenary property by all the adult members of the joint Hindu family is presumed to be for necessity and passes a good title and it is for the person who wants to impeach the alienation to establish that the alienation was not justified by necessity: 11 A. I. R. 1924 Oudh 300, *Rel. on.*

[Para 3]

(b) Hindu law—Widow—Right of residence and maintenance not charged upon property — Alienation of property by all adult coparceners—Effect.

The right of a widow to maintenance and residence is not a charge upon the joint family property until it is fixed and charged upon the estate. In the absence of such charge, the right is liable to be defeated if all the coparceners make an alienation of the joint family property for a necessary purpose. Carrying on of a joint Hindu family business is such a purpose.

[Paras 5 and 6]

Cases referred:—

1. ('43) I. L. R. (1943) 24 Lah. 345 : 30 A. I. R. 1943 Lah. 33 : 205 I. C. 37 (F. B.), *Mt. Mauli v. Lala Brij Lal.*

2. ('23) 72 I. C. 1000 : 11 A. I. R. 1924 Oudh 300, *Shamsher Datt Singh v. Lalta Singh.*

Shamair Chand — for Appellant..

Mela Ram and Madan Mohan Lal —

for Respondents.

Abdul Rashid C. J.—The facts of the case, in so far as they are material for the purposes of this Letters Patent Appeal, may be shortly stated. One Chandu Lal had three sons namely, Dhani Ram, defendant 2, Muni Lal, defendant 3, and Ram Sarup, defendant 4. Chandu Lal died and his widow Mt. Mauli and three sons survived him. On 17-6-1931, all the three sons executed a mortgage-deed in favour of Brij Lal defendant 1, for a sum of Rs. 13,000. The mortgaged property consisted of a house and some shops. In the deed, it was recited that the money was required to carry on the joint family business and pay off debts.

[2] Brij Lal brought a suit on the foot of the mortgage and obtained a decree for the sale of the mortgaged property on 18-10-1938. The property was put to auction and purchased by himself. On 18-5-1939 the present suit was instituted by Mt. Mauli, widow of Chandu Lal, for a declaration to the effect that she was entitled to reside in the mortgaged house and that the mortgaged house was liable to sale after reserving her rights of residence and maintenance. The suit was dismissed by the trial Court and an appeal by Mt. Mauli was dismissed by Mr. Capoor, District Judge. A second appeal was preferred to this Court and as a question of law was involved the case was referred to a Full Bench. The Full Bench judgment is reported as 24 Lah. 345.¹ After the Full Bench judgment had been delivered the case was remanded to the learned District Judge for a fresh decision. Mr. Abdul Majid, District Judge, on remand held that the mortgage was for necessity as it was made for the purposes of a joint family business. It was binding on the plaintiff. On second, appeal the case was heard by Mohammed Sharif J. He partly set aside the decision of the learned District Judge and held that the plaintiff was entitled to reside in the mortgaged house till her death. The appeal was accepted in part and the plaintiff was given a decree in respect of her right of residence. Against this decision, the defendant mortgagee has preferred the present appeal under cl. 10, Letters Patent.

[3] It was contended by Mr. Shamair Chand on behalf of Brij Lal appellant that the mortgage-deed was executed by all the living copar-

ceners of the joint Hindu family, that none of the coparceners was a minor at the time when the mortgage was created, that it was recited in the mortgage-deed that a sum of Rs. 13,000 was required for joint family business, and that in these circumstances it was not open to Mt. Mauli to contest the mortgage on the ground that it was not for necessity. Reference was made in this connection to para. 255 of Mulla's Hindu law where it is stated that if an alienation is made of coparcenary property by the whole body of coparceners and they all happened to be adults, a good title would pass to the alienee. In the present case, all the coparceners joined in making the alienation. They were members of a joint Hindu family and were carrying on a joint Hindu family business. It was recited in the mortgage-deed that a sum of Rs. 13,000 was required to carry on the business of the family and to pay the business debts due from the joint family. In these circumstances, it must be held that the mortgage-deed passed a good title to the alienee and it was for Mt. Mauli plaintiff to establish that the alienation was not justified by necessity. It was laid down by the Oudh Court in 72 I. C. 1000² that where all the adult members of a joint Hindu family joined in raising a loan on the security of the joint property of the family that is sufficient to raise a presumption of necessity.

[4] Brij Lal appeared as a witness and stated that the money was required to carry on joint family business. In view of the presumption alluded to above and the statement of Brij Lal it was held by the learned District Judge that the present alienation was justified by necessity. It was for the plaintiff to rebut that presumption and prove that the money was required for immoral or illegal purposes. No reliable evidence to that effect has been placed on the present record.

[5] Mr. Mela Ram, on behalf of the plaintiff, submitted that the maintenance and residence of the widow of Chandu Lal was a charge on the property and that this charge could not be taken away by means of a mortgage created by the three sons of Chandu Lal. This contention appears to me to be devoid of all force. A reference may be made in this connection to para. 569 of Mulla's Hindu Law where it is stated that the claim, even of a widow, for maintenance is not a charge upon the estate of her deceased husband, whether joint or separate, until it is fixed and charged upon the estate. This may be done by a decree of a Court, or by an agreement between the widow and the holder of the estate, or by the will by which the property was bequeathed. Therefore,

the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention. In fact, a widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge exists. But where maintenance has been made, a charge upon the property, and the property is subsequently sold, the purchaser must hold it subject to the charge. In the present case, the right of maintenance of the widow was not made a charge on the property at any time. It is, therefore, liable to be defeated if all the coparceners alienate the property for the purposes of carrying on a joint family business.

[6] The question of a widow's right of residence is dealt with in para. 573 of Mulla's Hindu Law. It is stated there that where an undivided family consists of two or more males related as father and son or otherwise, and one of them dies leaving a widow, she is entitled to reside in the family dwelling-house in which she lived with her husband. If the house is sold by the surviving coparcener or coparceners without necessity, the sale does not affect her right, and the purchaser cannot evict her at all events until another suitable residence is found for her. If the purchaser buys the house with full knowledge that the widow is residing and is being maintained in it, the purchaser is not entitled to oust her even though there may be other property belonging to the family out of which her maintenance can be derived. But if the sale is for a family necessity, she is liable to be evicted even though the purchaser had notice at the time of purchase that she was in occupation of the house. It is obvious therefore that the right of Mt. Mauli is liable to be defeated if all the coparceners make an alienation for a necessary purpose. The carrying on of a joint Hindu family business is such a purpose. As the alienation was made by all the living coparceners and all of them were adults, it must be presumed that the alienation was one for necessity. The finding of the learned District Judge to that effect must be regarded as conclusive.

[7] For the reasons given above, I would accept this appeal, set aside the judgment and the decree of the learned single Judge and restore that of the learned District Judge dismissing the suit. In view of all the circum-

stances of the case, however, I would have the parties to bear their own costs throughout.

Mahajan J.—I agree.

N.S.D.

Appeal allowed.

A. I. R. (35) 1948 Lahore 19 [C. N. 6.]

CORNELIUS AND FALSHAW JJ.

Mohammada and others—Convicts—Appellants v. Emperor.

Criminal Appeal No. 531 of 1946, Decided on 7-2-1947, from order of Sessions Judge, Multan, D/-8-5-1946.

Criminal P. C. (1898), S. 154—First information by accused — Admissibility—Evidence Act (1872), S. 25.

A first information report which amounts to a confession is not admissible as being a confession made to a police officer, but a report not amounting to a confession can be admitted in evidence. At the same time, a report of the latter kind cannot, since the maker is an accused person and not a witness, be treated as evidence against any co-accused.

Where the report made by the accused was exculpatory so far as he himself was concerned, it was held that though the report was admissible in evidence it could not be treated as a piece of evidence to corroborate the case against the other co-accused : 5 A. I. R. 1918 Lah. 69 and 63 I. C. 822 (Lah.), *Ref.* [Para 5]

Annotation: ('46-Com.) Cr. P. C. S. 154, N. 11, Pts. 1, 2. Cases referred :

1. ('18) 4 P. R. (Cr.) 1918 : 5 A. I. R. 1918 Lah. 69 : 45 I. C. 273, *Harji v. Emperor.*
2. ('21) 63 I. C. 822 (Lah.), *Kaku v. Emperor.*

Abdul Aziz and Ram Lal Kapur—for Appellants.
Mohd. Amin Khan and Madan Mohan Lal for Advocate-General—for the Crown.

Falshaw J.—The three appellants in this case—Mohammada, Yara and Ditta—have been convicted under S. 302, read with S. 34, Penal Code, by the Sessions Judge, Multan, and sentenced to transportation for life.

[2] The case is somewhat unusual in that two distinct and inconsistent stories have been put forward in the prosecution evidence, one story being that of Mt. Gurdevan, the widow of Dhian Singh deceased, and her supporters, while the other may be described as the official version put forward by the police on behalf of the Crown. It is not in dispute that Dhian Singh deceased was a bad character with marked criminal tendencies and that he had only returned from the jail after serving a sentence of 18 months' rigorous imprisonment under S. 392, Penal Code, about two months before the present occurrence, which took place on 8-1-1946. The story told by Mt. Gurdevan, P. W. 6, is that twice on successive days before the occurrence Mohammada accused had come to the house of Dhian Singh on the pretext of buying fodder but on both occasions Dhian Singh had been out and when Mohammada came again shortly before sunset on the day of the occurrence Dhian Singh was present and Mohammada

asked for some fodder but Dhian Singh said that he had none. Mohammada, however, said that there was some fodder growing in Dhian Singh's field and that he wanted some for his camel and Dhian Singh accordingly set off with Mohammada towards his well, but they had gone only a few yards from the house, which from the plan appears to be in the middle of cultivated land and a good distance away from any other habitation, when Mohammada caught hold of Dhian Singh by his legs and five other men attacked him with spears. These were Ditta and Yara appellants and Anwar, Sarwar and Nura. On the outery of Mt. Gurdevan, it was alleged that Mengha Singh, Bahadur Singh and Wisakha Singh P. Ws. reached the spot. These witnesses are all related and according to the plan the house of Mengha Singh is at a distance of about 240 yards from the house of Dhian Singh, and the accused ran away on the approach of the witnesses. According to her story, Mt. Gurdevan left the witnesses at the spot to look after Dhian Singh while she herself went to the police station at Serai Sindhu which is only one mile from the scene of the occurrence. There she found that the Sub-Inspector was absent but she told her story to the Moharrir. Head-Constable Obaidullah (P. W. 14) Who however, did not record her report but said that her husband was a bad character and told her to wait. In the meantime, Mohammada accused also reached the police station and said something to the Head-Constable who told Mt. Gurdevan to return to the spot. On the way she went to the well of one Buta Singh and when she arrived at the spot the Head-Constable and some constables were already present there. Of the witnesses Bahadur Singh and Wisakha Singh were merely tendered for cross-examination, but Mengha Singh (P. W. 7) supported the story and stated that they had placed Dhian Singh on a cot and carried him inside his courtyard where about two hours later Foot Constable Feroze Khan (P. W. 5) arrived, followed some time later by the Head-Constable. According to Head-Constable, Obaidullah, however, Mt. Gurdevan did not come to the police station at all, but Mohammada arrived there and his report was recorded at 5-30 P.M.

[3] The story told by Mohammada is as follows. He keeps a camel for hire and on the day of the occurrence his camel had been hired by one Allah Bakhsh who appeared as (P. W. 3) for the purpose of carrying three bags of wheat to Serai Sidhu from Jasso Kawan where Allah Bakhsh has a flour-mill. Mohammada had accordingly loaded the wheat on his camel towards evening and was on his way to Serai Sidhu and when he passed near the house of

Dhian Singh the latter came out and asked him what he was carrying. Mohammada told him that he was taking some wheat and Dhian Singh snatched the leading string from his hand and led the camel into his house. Mohammada tried to stop him but Dhian Singh struck him on the neck with his fist and told him that he would not give him back his camel, as Mohammada's sister had beaten some Arain woman. Mohammada accordingly followed Dhian Singh into his house pleading with him to let the camel go, but inside the courtyard Dhian Singh made the camel sit down and unloaded the bags of wheat and told his wife to light a fire at once. Mt. Gurdevan did so and after emptying the bags of wheat Dhian Singh burnt the bags in the fire, since apparently they bore the name of Allah Bakhsh. Dhian Singh then brought three bags from inside his house and filled them with the wheat. While he was so engaged Gehna, who appeared as P. W. 4 came and saw what was happening and Mohammada appealed to him for help, telling him to fetch his brother-in-law Ditta. Dhian Singh adopted a threatening attitude towards Gehna who went away. Under further threats from Dhian Singh Mohammada then helped him to carry the three bags of wheat inside one of the rooms of his house, after which Dhian Singh told Mohammada to sit down and said that he would not allow him to take his camel away. While Mohammada was sitting there his brother-in-law Ditta and the latter's son Yara appeared on the scene armed with appears, and Ditta asked Dhian Singh why he had robbed Mohammada of his wheat in this manner. Dhian Singh then told his wife to fetch his gun and took up a stick and struck Ditta with it. A fight then began between Dhian Singh, Ditta and Yara and Mohammada immediately left with his camel for the police station. (After giving the medical evidence and other evidence and the conclusions of the learned Sessions Judge, their Lordships proceeded as follows:)

[4] On behalf of the appellants, it is contended that in fact there was really no evidence at all on which they could be convicted, since although the learned Sessions Judge has nominally based their conviction on the statement of Mt. Gurdevan, corroborated to a certain extent by the medical evidence, he has in fact relied almost entirely on the report made by Mohammada accused to the police. There is undoubtedly some force in this contention, since the evidence produced by the prosecution other than the statements of the witnesses, who have been disbelieved only supports the story of the robbery of the wheat, and the only evidence regarding how injuries were caused to Dhian Singh is in

the statements of Mt. Gurdevan and Mengha Singh and in the statement of Ditta accused. It is clear that if the evidence of Mt. Gurdevan and Mengha Singh to the effect that a deliberate attack was made on the deceased by six persons in pursuance of previous enmity is altogether disbelieved, that evidence cannot even be relied on to support the story that the three appellants inflicted injuries on Dhian Singh under an altogether different set of circumstances, and we are left with no evidence at all as to how Dhian Singh received his injuries except the various statements of the accused. It is thus impossible to arrive at the conclusion at which the learned Sessions Judge has arrived without relying very largely on the report of Mohammada, and particularly so regarding the participation of Yara which is now denied by Mohammada as well as the other accused. Briefly, the position of the learned counsel for the appellants is that although the report of Mohammada is admissible in evidence it does not amount to evidence of any offence on the part of Mohammada himself, since the report is to the effect that after being robbed of his wheat and detained by the deceased, he escaped as soon as the opportunity was afforded by the arrival of his supporters, and that the report cannot be treated as evidence against the other accused.

[5] The question of first information reports made by accused persons has been considered in two decisions of this Court. The first of these, 4 P. R. (Cr.) 1918,¹ deals with a case in which four brothers were accused of murdering another man and the Sessions Judge found that the story told by the prosecution witnesses was altogether false, but convicted two of the brothers on the strength of a report made to the police by one of the brothers who was acquitted which was to the effect that the two brothers, who were convicted, had attacked the deceased and another man when they caught them stealing their cattle. Scott Smith and LeRossignol JJ. held that first reports made to the police may be, and generally are, very valuable corroborative evidence of the testimony of the person who makes them but in this case Hira the maker, was not a witness but an accused person and, consequently, his report to the police constituted no corroboration of either the case against himself or of that against his brothers. In fact his first report was not admissible in evidence at all. The other case, 63 I. C. 822,² deals with a case in which the man was alleged to have murdered his own wife in the middle of the night and done away with her body and on the following day he had gone to the police station and made a report to the effect that his wife had been abducted by another man with whom she was said to be in

love with the assistance of some other persons. The body of the woman and later recovered at the instance of the accused and his report was treated as a piece of circumstantial evidence against him. It was, however, contended that the report was inadmissible, and reliance was placed on 4 P. R. (Cr.) 1918,¹ in support of this. It was however held by Shadi Lal and Abdul Qadir JJ., that the report in the previous case could not be received in evidence as it amounted to a confession, but the report in the case before the Court was used only for the purpose of proving an admission which did not amount to a confession and there was nothing in the Evidence Act to render an admission not amounting to a confession inadmissible in evidence against an accused person, and therefore there was no reason why the report should not be treated as a piece of evidence. Actually the first information report 4 P. R. (Cr.) 1918,¹ did not amount to a confession by the maker, since he did not implicate himself in the attack on the deceased, and the question of the admissibility of the report does not appear to have been considered from this angle, and the decision apparently goes too far if it is to be taken to imply that all reports, whatever their nature, made by accused person are inadmissible in evidence. The position may, however, be summed up as being that a report which amounts to a confession is not admissible as being a confession made to a police officer, but a report not amounting to a confession can be admitted in evidence. At the same time a report of the latter kind cannot, since the maker is an accused person and not a witness, be treated as evidence against any co-accused. The report in the present case being exculpatory as far as Mohammada is concerned is therefore admissible in evidence, but I would certainly agree with the learned counsel for the appellants that it cannot be treated as a piece of evidence to corroborate the case against Ditta and Yara, and without the report and in the absence of any other reliable evidence whatsoever we can only fall back on conjecture which in this case involves difficult questions of the right of private defence of person and property and on which it is not possible to base a conviction. I would accordingly accept the appeal and acquit the appellants.

Cornelius J.—I agree.

K.S.

Accused acquitted.

* **A. I. R. (35) 1948 Lahore 21 [C. N. 7.]**

ABDUL RASHID C. J. AND MAHAJAN J.

Bharat Insurance Co., Ltd. Lahore—Defendant—Appellant v. Sm. Lakshmi Devi, Plaintiff and others, Defendants—Respondents.

Second Appeal No. 743 of 1946, Decided on 6-1-1947, from judgment of Abdur Rahman J., D/- 11-6-1946.

*Married Women's Property Act (3 [III] of 1874), S. 6 — Life insurance policy — Sum assured payable to assured or his wife on his death if earlier — Effect.

The words "expressed on the face of it to be for the benefit of the wife" in S. 6 include a case where the wife is to receive the benefit only in certain contingencies. [Para 5]

In a life insurance policy, against the entry to whom payable, occurred the following word: "The life assured or his wife on his death if earlier."

Held that the policy was expressed on the face of it to be for the benefit of his wife and hence a trust was created in favour of the wife from the very inception of the policy under S. 6, though the trust was that of a contingent interest in the policy: 19 A.I.R. 1932 Mad. 220; 25 A. I. R. 1938 Mad. 604 (F. B.) and 25 A. I. R. 1938 Mad. 413, *Rel. on*; 21 A.I.R. 1934 Bom. 296; 24 A.I.R. 1937 Mad. 645 and 24 A. I. R. 1937 Sind 181, *Dissent*. [Para 9]

Cases referred:—

1. ('34) 58 Bom. 513 : 21 A. I. R. 1934 Bom. 296 : 152 I. C. 168, *Dinbai v. Bamansha Jamsaji*.
2. ('37) 24 A. I. R. 1937 Mad. 645 : 169 I. C. 481, *Lalithambal Ammal v. Guardian of India Insurance Co., Ltd.*
3. ('37) 24 A. I. R. 1937 Sind 181: 31 S. L. R. 98: 170 I. C. 225, *Shamdas Gobindram v. Mt. Savitribai*.
4. ('32) 55 Mad. 171 : 19 A. I. R. 1932 Mad. 220 : 141 I. C. 680, *Abhiramavalli Ammal v. Official Trustee of Madras*.
5. ('38) I. L. R. (1938) Mad. 909: 25 A.I.R. 1938 Mad. 604 : 177 I. C. 119 (F. B.), *Krishnan Chettiar v. Velayee Ammal*.
6. ('38) I.L.R (1938) Mad. 867: 25 A.I.R. 1938 Mad. 413 : 181 I. C. 984, *Kannaya Lal v. Subbraya Chetty*.
7. (1926) 1 Ch. 48 : 95 L. J. Ch. 195 : 135 L. T. 374, *In re Fleetwoods policy*.

Faquir Chand Mittal — for Appellant.

Bodh Raj, Norman Edmonds and Krishan Lal Kapur for Official Trustee, Punjab—for Respondents.

Abdul Rashid C. J. — This is a second appeal preferred by the defendant, the Bharat Insurance Company, from a decision of the Senior Subordinate Judge of Lahore decreeing the plaintiff's claim and reversing the judgment and the decree of the trial Court.

[2] To appreciate the question of law involved in this appeal it is necessary to state the facts of the case briefly. On 24-12-1929, Dr. Kanhya Lal effected a policy of insurance for Rs. 2000, with the Bharat Insurance Company. In column 9 of the schedule against the entry, "person or persons to whom the sum assured is payable" occur the following words. "The life assured on his attainment of the age of 60 years or his wife Shrimati Lakshmi Devi aged 35 years on his death if earlier." On 2-2-1935, the policy was converted by the assured into a paid up one for Rs. 500. This was done with the consent of the nominee, namely Shrimati Lakshmi Devi. On 8-8-1935, Dr. Kanhya Lal took a loan of Rs. 165 from the Insurance Company and deposited the policy with the Company as security. Dr. Kanhya Lal died on 8-6-1942. On the date of his death a sum of Rs. 675 became payable. The loan of Rs. 165 had swelled to the sum of

Rs. 214-7-9 by the addition of interest till 8-6-1942. After deducting the sum of Rs. 214-7-9 from Rs. 675, the Company deposited the sum of Rs. 460-8-3 in the Court of the District Judge under S. 47, Insurance Act, as there were rival claimants to this amount. The amount deposited by the Insurance Company was paid by the District Judge to Shrimati Lakshmi Devi. She claimed an additional sum of Rs. 250 from the insurance Company. The basis of her claim was that the Insurance Company had no power to deduct the amount of Rs. 214-17-9 in respect of the loan taken by her husband, as a trust had been created in her favour from the very inception of the policy and that the husband could not raise a loan which would adversely affect the trust in her favour. She was, therefore, entitled to a refund of Rs. 214-7-9, together with interest thereon, the total being Rs. 250. This claim was repudiated by the Insurance Company. She accordingly instituted a suit against the Insurance Company for recovery of Rs. 250. This suit was dismissed by the trial Court, but the judgment and the decree of the trial Court were reversed on appeal by the learned Senior Subordinate Judge of Lahore. Against this decision as already mentioned, the Insurance Company has preferred a second appeal to this Court.

[3] The sole question for determination in the present appeal is whether a trust was created in favour of the wife of Dr. Kanhya Lal from the very inception of the policy under S. 6, Married Women's Property Act. Section 6 of the Act is in the following terms:

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Province in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy or such of them as are then existing."

It was contended by Mr. Mittal, on behalf of the appellant, that as the policy was payable to the assured on his attainment of the age of 60 years this was not a policy which was expressed on the face of it to be for the benefit of the wife of the assured. Had Dr. Kanhya Lal lived up to the age of 60 years, he would have derived the sole benefit from this policy, and his wife would not have been entitled to any sum payable under the policy. In his lifetime Dr. Kanhya Lal was the sole beneficiary under the policy and it was open to him to raise any loan on the security of this

policy. On the death of Dr. Kanhya Lal, the benefit due under the policy was to go to his widow Lakshmi Devi, but she was bound to discharge the liabilities incurred by the husband on the security of this policy. In this connection reliance was strongly placed by the learned counsel on the case in 58 Bom. 513.¹ In the reported case a policy was effected on the life of one Hormasji. It was an endowment policy payable at death or at the age of fifty-five and the amount thereof was made payable to Hormasji's wife provided she survived the assured, and failing her, to the assured, his executors, administrators or assigns. The plaintiff who was a creditor of Hormasji obtained a decree against his estate in the hands of the widow and attached the amount payable under the policy in execution of the decree. The widow contended that the policy money did not form part of her husband's estate but were her own property. It was held that the policy was not a policy within the meaning of S. 6, Married Women's Property Act, 1874; it was for the benefit of the assured himself and formed part of his estate and therefore, the policy amount could be attached in the hands of the widow of Hormasji. The following observations occur at p. 518 of the report:

"Now it cannot be argued that this is a policy which falls within S. 6 of Act 3 [III] of 1874. The policy contemplated there is one which is for the benefit of his wife or of his wife and children. On the face of it, this policy is for the benefit of the assured himself if he attains the age of fifty-five, and if he had attained the age of fifty-five, the policy would have been payable to him, and would undoubtedly have formed part of his estate, nor would his wife have had any interest in it. The person whom the Act contemplates as receiving the actual payment of a policy under S. 6 is the Official Trustee of the Presidency in which the office of the insurance company is situate, and it must be presumed that such a policy would be payable to him alone. In the present case, if the insured had not died before attaining the age of fifty-five, payment could not possibly have been made to the Official Trustee, the Administrator General in this Province. In this case the terms of the policy are such, in my opinion, as not to fall within S. 6, Married Women's Property Act, assuming that Act to apply, and therefore, the policy must be regarded as forming part of the estate of the deceased Hormasji, and the appeal must be dismissed with costs."

[4] The learned counsel also strongly relied, on a Single Bench ruling of the Madras High Court reported as A. I. R. 1937 Mad. 645.² In this case one V. Sundaresayya had effected a policy of insurance upon his own life and under the heading "for whose benefit and to whom payable" were the words "the assured or his wife if he predeceases her." During his lifetime the assured by an endorsement on the back of the policy assigned to a bank all the benefit under the policy for valuable consideration. The assured having predeceased his wife, she claimed that upon effecting of the policy, a trust immedia-

tely came into existence in her favour, and that the deceased could not assign the benefits to the bank. In these circumstances it was held that the benefit was to accrue to the deceased Sundaresayya in the first instance and on the contingency of his dying before, it was to go to his wife. Hence no trust in favour of the wife could be created until the death of the assured, and the assured during his lifetime could assign the benefits to the bank being unfettered by any trust in his wife's favour. A similar proposition of law was laid down by the Sind Court in A. I. R. 1937 Sind 181.³ It was held that in order to attract the applicability of S. 6, Married Women's Property Act, the policy must be expressed to be for the benefit of the insured's wife or his children and money should be made payable to the Official Trustee. Until these two conditions are fulfilled, there can be no statutory trust in favour of the wife. Merely the words "payable to the assured or his wife" would not contemplate a trust in favour of the wife because these words would not confer an absolute estate or would not create a trust in favour of the wife. If no express provision is made in the policy for the payment of the moneys to the Official Trustee the insured at any time can revoke the policy with or without the consent of his wife as the case may be, but in the case of a statutory trust he would have no right to revoke it because the money would be payable to the Official Trustee.

[5] It appears to me, with all respect to the learned Judges, who decided the three cases referred to above, that they have unduly restricted the meanings of the words "expressed on the face of it to be for the benefit of the wife" occurring in S. 6, Married Women's Property Act. It has been taken for granted in these three authorities that the policy should be *for the sole benefit of the wife*, and that the trust in favour of the wife must not be of a contingent interest. According to these authorities, if any benefit is reserved for the assured during his lifetime, the policy cannot be held to create a trust in favour of the wife even though in certain contingencies the entire benefit of the policy is to go to the wife. In my opinion, the words "expressed on the face of it to be for the benefit of the wife" include a case where the wife is to receive the benefit only in certain contingencies. It creates a trust in favour of the wife from the date on which the policy is effected, though the trust is that of a contingent interest in the policy. Reference may be made in this connection to the case in 55 Mad. 171.⁴ In this case a life insurance policy, in the column headed "to whom payable" contained the following words, viz., "the assured or his wife if he predeceases her." It was held that

the said words express on the face of the policy that the same is for the benefit of his wife, and as such it enures and is deemed to be a trust for the benefit of the wife, within the meaning of S. 6, Married Women's Property Act.

[6] The question involved in the present appeal was considered at length by a Full Bench of the Madras High Court in I L R (1938) Mad 909.⁵ The observations made in the judgment of the learned Chief Justice at page 920 of the report may be reproduced in *extenso*:

"This brings me to the contention of the learned Advocate for the appellant that the words used in answer to question No. 12 of the proposal, "Self or wife Velayeammal," cannot be construed as constituting a trust in favour of the respondent. He would attach no meaning at all to those words. The answer to the question is certainly not as full as it might have been, but it is an answer, and the words can be construed as meaning that the policy was to be for the benefit of the assured or, in the event of his death before the policy matured, it was to be for the benefit of his wife. It seems to us that this is the only reasonable interpretation to be placed upon the words, and placing this interpretation upon them it means that there was a trust created in favour of the respondent in the event of the husband dying before the policy matured. That there can be a contingent trust is accepted in England, and, as the Married Women's Property Act of 1874 followed similar legislation in England, English decisions are directly applicable."

[7] In I. L. R. (1938) Mad 867⁶ an application was filed by the creditor of an insolvent for the assignment of a policy of insurance taken out by the insolvent in his favour. The words "the policy is for the benefit of the wife" were not found in the policy, but it was stated therein that the amount due on the policy should be paid to the assured, i. e., to respondent 1 on the expiry of the period of fifteen years, or to his wife on the death of the assured if earlier. In these circumstances it was held that there was a trust impressed on the policy in favour of the wife, from the moment the policy was taken out for her benefit, though she would not be entitled to claim anything unless the event referred to in the policy happened. The following observations may be reproduced with advantage:

"I am of the opinion that if the words found in the policy lead to the conclusion that the policy was for the benefit of the assured's wife then according to S. 6, Married Women's Property Act it shall be deemed to be a trust and enure as such so long as the wife is alive. This does not mean of course that the wife is entitled to claim anything by virtue of the above trust straightway. The benefit which accrues to her under the trust will be subject to the other conditions in the policy but the trust is impressed upon the policy from the moment the policy comes into existence, and it cannot, in my opinion, be said that the trust comes into existence for the first time only after the event which is to determine the payment under the policy takes place. In other words, the wife will not be entitled to claim anything under the policy unless the event referred to in the policy happens, but the trust is brought into existence the moment the policy is taken out for the benefit of the

wife. That being the case, the trust attaches itself to the policy from the very moment of its birth and the policy cannot thereafter be looked upon as available to the creditor regardless of the trust imposed upon it. The position, therefore in law is that there is a trust impressed on the policy in favour of the wife; at the same time it cannot be said that the insured has no interest in the policy, because in a certain event, namely, after the expiry of fifteen years from the date of the policy the money thereunder is to be paid to him if he is then alive, and it is only in the event of his death within this period that the money could be paid to his widow if she is then alive. The policy thus constitutes property in which both the insured and his wife have an interest. It is not possible to say at present what the interest is because it is entirely dependent on the events above referred to. In these circumstances it is not open to the creditor to treat the policy as being the property of his debtor and to require an assignment of it and to compel the Insurance Company to acknowledge such an assignment as valid and binding upon them."

[8] I am in respectful agreement with the observation reproduced above. It was contended by Mr. Mittal on behalf of the appellant that the observations made in the three Madras cases referred to above were based on the case in (1926) 1 Ch. 48⁷, that the English case was distinguishable from the present case, that the Madras High Court had not taken a correct view of the law and that the view taken by the Bombay and Sind Courts should be preferred. In (1926) 1 Ch. 48⁷ a husband took out an insurance policy for £500, on his life, and by the terms of the policy the insurance company agreed to pay that sum to the insured's wife, if she were living at his death, or in the event of her prior death to pay it to the insured's executors, administrators and assigns. The policy contained a proviso that, if at the end of twenty years, the insured was still living, he should have the right to exercise any of six specified options. The insured being then still living, he exercised an option to receive the entire cash value of the policy with its share of accumulated profits and to discontinue the policy. A sum of £288 thus became payable. The insurance company were unwilling to pay over this sum except on the joint receipt of the husband and wife, and ultimately paid it into Court. In these circumstances it was held that the policy came within S. 11, Married Women's Property Act, 1882 and created a trust in favour of the wife in certain events. It is true that the facts of that case were not on all fours with the facts of the present case; but the general question of law as to what constitutes a policy for the benefit of the wife was considered at length by Tomlin J. The following observations which occur at page 53 of the report may be reproduced in *extenso*:

"A number of cases have been cited to me, and my attention has also been called to S. 11, Married Women's Property Act, 1882. In my view that section applies to this policy. The policy is, in the terms of the section, a policy of assurance effected by a man on his

own life, and expressed to be for the benefit of his wife. It is true it is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy created a trust in favour of the wife, but only in terms of the trust."

[9] The above case fully supports the proposition that if any benefit is reserved for the wife a trust is created in favour of the wife from the very birth of the policy even though the trust may be that of a contingent interest. Contingent interest is property though the interest which ensures for the benefit of the wife may not be available to her straightway. If the husband is allowed to operate on the policy he may raise a loan to the full extent of the policy and may destroy the trust of the contingent interest created in favour of his wife at the inception of the policy. If a trust of a contingent interest is created from the moment that the policy is taken out the husband cannot be allowed to destroy the trust of the contingent interest which had come into being at the time that the policy was effected. I am, therefore, in respectful agreement with the opinion expressed by the Full Bench of the Madras High Court in I L R (1938) Mad. 909.⁵ In my opinion, the Bombay and Sind Courts have unduly restricted the meaning of the words "expressed on the face of it for the benefit of his wife" occurring in S. 6, Married Women's Property Act.

[10] For the reasons given above, I would affirm the decision of the Court below and dismiss this appeal. Having regard to all the circumstances I would leave the parties to bear their own costs throughout.

Mahajan J. — I agree.

V.B.B.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 24 [C. N. 8.]

MARTEN AND KHOSLA JJ.

Emperor v. Ram Singh s/o Harnam Singh
— Accused — Respondent.

Criminal Appeal No. 316 of 1946, Decided on 31-10-1946, from order of Sessions Judge, Ludhiana, D/- 22-12-1945.

(a) Evidence Act (1872), S. 114 Illus. (b) and S. 133—Approver—Evidence—Corroboration—Criminal P. C. (1898), S. 337.

In law, the statement of the approver alone may be taken as sufficient proof to establish the crime, but it is the invariable practice of the Courts to require in the case of an approver's statement, evidence corroborating not only the approver's own part in the crime, but the fact that the accused has been truthfully implicated.

[Para 9]

Where the accused is charged with murder and the approver states on oath that he helped the accused to kill the deceased, what is required is not separate proof of the fact of murder but sufficient evidence to corroborate the approver's statement.

[Para 9]

Annotation : ('46-Com) Criminal P. C. S. 337 N 17.

(b) Penal Code (1860), S. 300—Death caused by strangulation and suffocation—Evidence.

It is possible to kill a person with an instrument such as a broad soft cloth without leaving any *post mortem* signs on the corpse. (Difference between strangulation and suffocation pointed out). [Para 11]

(c) Criminal trial—Examination of witnesses—Duty of Judge.

A Judge who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty. [Para 15]

Harbanse Singh for the Advocate General—for the Crown.

Respondent in Person with Malik Shaukat Ali (at Government expense).

Marten J.—This is an appeal by the Crown against the acquittal of the respondent Ram Singh *alias* Siriya who was tried by the learned Sessions Judge, Ludhiana, on the charge of murdering Mt. Tejo on the night of the 26th and 27-4-1945. Counsel has been assigned by the Crown to represent Ram Singh respondent in this appeal. Ram Singh himself has also been present and we have heard what he has had to say.

[2] On 1-5-1945, Mukhtiar Singh, a P.W.D. mali, went to the Thamlanwala well near village Ghalib Kalan, to draw water. He found the dead body of a woman floating in this well and informed the jamadar. These two then informed the Lambardars of the village who returned with them to the well together with the Chaukidar and verified the fact that there was a body therein. As it was then night time they set a watch upon the well and on the following morning Sher Singh, Lambardar, went to Jagraon Police Station and reported the fact to Yusaf Ali Shah, Head-Constable. Sardar Khushal Singh, Inspector of Police, and party went to the well. Sabu Chaukidar was then lowered into the well and he removed the body. An inquest report was then prepared by Yusaf Ali Shah. It was noticed that the words "Tej Kaur" were tattooed on the right wrist of the corpse, and gold-ear-rings, glass bangles, a bodice, a shirt and some rings were recovered from the body which was sent to Jagraon Mortuary.

[3] Khan Nur Mohammad Khan, Sub-Inspector, held the inquest on the 2nd of May and steps were taken to ascertain the identity of the deceased. Information was then received that a woman named Mt. Tej Kaur, daughter of Pala Singh of Ferozepur district, who had been married to Sardara Singh of Rurki in the Jullundar district, had run away from her husband with Kirpal Singh. Her brother, Lal Singh was then sent for and on hearing the description of the dead body, which had already been cremated and seeing the articles recovered, he told the investigating officer that the body

was that of his sister Mt. Tej Kaur a woman of notoriously promiscuous tendencies. Kirpal Singh was then sent for and questioned. He also identified the deceased from her description and from the articles shown to him. On information received from Kirpal Singh the investigating officer then sent for Ram Singh, the present respondent, who appeared before him on the 18th of May, and after interrogation on the 20th, led the investigating party to his house in Kokri from which a large number of articles of jewellery and some female clothing and currency notes were produced by him. These articles were subsequently identified by various prosecution witnesses as having belonged to the deceased. This aspect of the case will be dealt with fully later.

[4] Ram Singh's own shirt was also taken into custody. Ram Singh had previously taken the investigating party to a field near the Thamlanwala well from where three cigarette ends, a button and some pieces of broken bangles had been recovered. The button recovered is said to have become detached from Ram Singh's shirt at the time of murder.

[5] As a result of information received from Ram Singh, Gurdial Singh was sent for on the 24th of May and interrogated. He pointed out a well near village Kili Chablan from which certain articles were recovered. Subsequently Gurdial Singh disclosed that some cash and a gold *dandi* were lying in his house. These were produced by him.

[6] Gurdial Singh was granted a conditional pardon and made an approver, in which capacity he gave evidence before the learned Sessions Judge at the trial. His story is briefly as follows. He had become acquainted with Ram Singh as they plied tongas on the same route between Moga and Jagraon. Ram Singh resided at Kokri a distance of some two miles from his own village. Ram Singh had suggested that he should sell his tonga and get a better one. He sold the tonga and handed over the proceeds to his mother. On the next day, he went to Moga with the idea of buying another and at about 4 P. M. he met Ram Singh who told him that Mt. Tej Kaur was in his company. He suggested that they should purchase liquor and told the approver that Mt. Tej Kaur had a lot of valuable ornaments with her which they might steal on their way back to Dadan, where Mt. Tej Kaur wished to go that night. The approver fell in with this suggestion and they proceeded to a liquor shop. They then went to the shop of Babu Ram near the tonga-stand where they found Mt. Tej Kaur. They began to drink and presently Mt. Tej Kaur asked them to take her in a tonga to Dadan, but they replied that they would start at about

sunset. After purchasing more liquor with the money borrowed from Mst. Tej Kaur they eventually set out in the tonga for Dadan. On the way they were met by Dharman and Mehnga Singh. Dharman asked to be taken to Ajitwal and after some argument was given a lift in the tonga up to Badhni. At Ajitwal tonga-stand they were met by Gurmel Singh and Nagindar Singh. Gurmel Singh suggested that they should all stay with him for the night. Mt. Tej Kaur however did not agree. They set out again for their destination and on arriving in the area of Thamlianwala well Ram Singh drove the tonga into the fields at the side of the road and stopped it there. They got out of the tonga and after drinking and smoking Ram Singh induced Mt. Tej Kaur to have sexual intercourse with him. They continued this for some time. Ram Singh then went to the tonga whereupon the approver also had sexual intercourse with Mt. Tej Kaur. Ram Singh returned, bringing a *dopatta* from the tonga and again had sexual intercourse with the woman. While he was doing this he put the *dopatta* round her neck and started to strangle her with it. Mt. Tej Kaur implored to be spared and the approver also supported her, but Ram Singh replied that Mt. Tej Kaur's brother had once fired at him and called upon the approver as his old friend to help him to strangle the woman. The approver then held Mt. Tej Kaur's arms while Ram Singh strangled her with the *dopatta*. They then robbed her clothing and jewellery, and putting her body in the tonga, carried it to the well into which they threw it. They then returned in the tonga to Ajitwal, but on the way the approver threw a *salwar*, a *chadar* and a pair of shoes belonging to the deceased into another well.

[7] On arrival at Ajitwal they took some food at the house of the approver's father-in-law and left a bottle and a cup with him. After meeting various persons they spent the night at Ram Singh's house, and on the next morning they divided the spoil.

[8] The learned Sessions Judge is of the opinion that the evidence produced in this case is not sufficient to warrant a conviction. He is not even certain that it is conclusively proved that the dead body recovered from the well is that of Mt. Tej Kaur. He considers that the medical evidence goes to rebut this identification. He is also not convinced that either the recoveries or the statements of those persons who are alleged to have seen the deceased with the accused on the fatal tonga ride, are sufficient corroboration of the approver's story; neither does he rely on any of the articles recovered as establishing that that story is true.

[9] In my opinion the learned Sessions Judge

has misdirected himself as to the nature of the evidence required in this case. He has reviewed the several circumstances adduced in corroboration, separately; and has come to the conclusion in each case, that they themselves are not sufficient to prove either the identity of the body, or the fact of Mt. Tej Kaur's murder. He has forgotten that in this case there is a witness who has stated on oath that he helped to kill Mt. Tej Kaur and what is required is not a separate proof of this fact, but sufficient evidence to corroborate his statement. In law, this statement alone could be taken as sufficient proof to establish the crime, but it is the invariable practice of the Courts to require in the case of an approver's statement, evidence corroborating not only the approver's own part in the crime, but the fact that the accused has been truthfully implicated. In my view, in the present case, these obligations have been fully discharged by the corroborative evidence on record, though I think that had the agency responsible for presenting the case in Court taken the trouble to study the police records and put questions obviously indicated to the witnesses, a much stronger case could certainly have been made out.

[10] The learned Sessions Judge is of the opinion that the identity of the dead body has not been sufficiently established. His points are that the murder took place, according to the approver, on the night of 26th and 27th April; the post mortem examination being performed on 2nd May. The doctor stated that the interval between the death and the post mortem examination was three days, whereas an interval of five days had actually elapsed. He concludes that this contradiction is fatal to the prosecution, but I do not think that it is anything of the sort. The body was in a state of advanced decomposition and it is notoriously difficult in such cases, to predict the time of death with any accuracy. In spite of the apparent discrepancy no question was put to the doctor to ascertain whether in these circumstances, it was not impossible that death had taken place as much as five days prior to his examination. From my own experience of such cases I do not think that in these circumstances an interval of 48 hours is any serious discrepancy.

[11] Next, it is stated that although the approver alleges that the woman was strangled, there were no signs of ligature on the corpse. Here again, the proper questions have not been put to the doctor. In my own experience cases have occurred of a similar nature in which a careful examination of the medical experts has elicited beyond doubt that it is possible to kill a person with an instrument such as a broad soft cloth without leaving any post mortem signs.

There is a distinct difference between strangulation and suffocation. "Strangulation" means stoppage of the blood and this can be achieved by pressure on the arteries on both sides of the neck only. If blood stoppage in complete death takes place in a very short time and need not be accompanied by any simultaneous stoppage of breathing, which is termed 'suffocation.' Death, on the other hand, can be caused by suffocation without strangulation if the wind passages are effectively blocked, which can easily be done by winding a soft cloth tightly over the nose and the mouth. Here also, no post mortem signs would necessarily be left. The approver was not questioned as to the exact manner in which the cloth was applied in this instance, but it is quite possible that the woman was partially strangled and partially suffocated. Moreover, a longer immersion in water and an advanced stage of decomposition might well obliterate any marks which such a weapon would be likely to have made. No questions were put to the doctor on this point.

[12] It is next pointed out by the learned Sessions Judge that Mt. Tej Kaur is said to have given birth at least to one child about eight years ago, but according to the medical opinion, the body of the woman indicated that though she was used to sexual intercourse, she had probably never delivered any children. Again, the doctor was not properly cross-examined on this point. We do not know from what circumstances he drew these conclusions and in my opinion, in view of the advanced stage of decomposition reached and the admittedly long time that has elapsed since the birth of this child, the doctor was not on sure ground when making his statement.

[13] Next he points out that the woman is stated to have been suffering from gonorrhea for a number of years, but there is nothing in the medical evidence to show that the dead body indicated that the deceased had suffered from this disease. Again, the doctor was never asked anything about this subject. Neither was the Chemical Examiner, to whom vaginal smears were sent, asked to report on the possibility of gonorrhea infection. I myself have never come across a case in which a doctor has volunteered the statement that as a result of his post mortem examination he had ascertained that the deceased had been suffering from gonorrhea.

[14] As regards the tattooed name "Tej Kaur" on the right forearm, the learned Sessions Judge has pointed out that on the dead body recovered there were also the word "Om" tattooed in Hindi on the back of the right hand with the figure 5 tattooed adjacent to it, and a flower tattooed over the front of the left

forearm; but Lal Singh, brother of the deceased, and even Ujagar Singh her cousin, did not make mention of these additional tattoo marks. They only stated that the name "Tej Kaur" had been tattooed on her arm.

[15] No question was put to these witnesses about these additional tattoo marks. But had the Public Prosecutor examined the police records, they should certainly have indicated to him that further questions should have been put to the witnesses regarding them. Had they been properly examined, I think that this discrepancy would have disappeared. I might here remark that these police records were also before the learned Sessions Judge at the time of the trial. They are supplied to him to enable him to follow the police investigation and ask relevant questions of the witnesses when such are indicated. It has been pointed out by this Court that a Judge who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty. These remarks, I think apply in the present case. [His Lordship discussed the evidence further and proceeded:] All this evidence leads me to the irresistible conclusion that the approver is telling the truth not only about himself, but also in implicating the respondent Ram Singh. I would allow this appeal, set aside the order of acquittal and substitute one of conviction under S. 302, Penal Code.

[16] The question of the penalty now to be imposed, needs consideration. It is true that a considerable time has now elapsed since the order of acquittal was announced by the learned Sessions Judge. I however feel strongly that the learned Sessions Judge should undoubtedly have sentenced Ram Singh to death, and as there are no intrinsic circumstances warranting leniency, I consider it the duty of this Court now to do what should have been done at the trial. I would accordingly sentence Ram Singh to death.

Khosla J. — I agree.

V.B.B.

Appeal allowed.

A. I. R. (35) 1948 Lahore 27 [C. N. 9.]

CORNELIUS AND FALSHAW JJ.

Emperor v. Anwar Ali s/o Din Mohd. — Respondent.

Criminal Appeal No. 851 of 1946, Decided on 11-4-1947, from order of 1st Addl. Sessions Judge, Lahore, D/- 28-5-1946.

Penal Code (1860), S. 161 — Accused accepting marked currency notes from decoy witness—Necessity of corroboration of statement of decoy witness.

To establish a case of bribery against the accused for having accepted marked currency notes from a decoy witness employed by the police in furtherance of a trap

against the accused, it is not sufficient to prove that marked notes passed from the decoy witness to the accused. It is of the utmost importance in cases of this kind that there should be independent corroboration of the statement of the decoy witness, that the money was received by the accused person for an illegal purpose. [Para 4]

Bhagwan Das Mehra — for the Crown.

Ferozuddin Ahmad — for Respondent.

Cornelius J. — This is an appeal by the Crown against the acquittal of the respondent Anwar Ali, a Ticket Collector at the Lahore Railway Station. Anwar Ali had been prosecuted under S. 161, Penal Code, on the charge that on 3-11-1944, he accepted a sum of Rs. 5 as illegal gratification for providing a person Mr. Bahi P. W. 2 with a berth in a second class compartment of the Bhatinda Express, and had been convicted by Mr. Kanwal Nain, Magistrate, first class, and sentenced to pay a fine of Rs. 500, but on appeal it was held by an Additional Sessions Judge that the money which admittedly passed from Mr. Bahi to the accused on the railway platform where the train was standing was not accepted by the accused as illegal gratification, but on the other hand was given to him as excess fare for providing him with a seat in a first class compartment up to Ferozepore Cantonment. Accordingly, the accused was acquitted.

[2] The case resulted from the activities of the Special Police establishment maintained by the War Department of the Government of India at Lahore. Mr. Bahi describes himself as Supervisor of a Parachute Factory at Lahore and it appears that he has personal contacts with police officers through their patronising his father's tailoring shop. He consented to pose as a second class passenger who had failed to book a berth in advance and wished to travel by the Bhatinda Express on the evening of 3-11-1944, and he was provided with currency notes of which the numbers and denominations had been noted in advance by a Magistrate, Ch. Jhanda Singh P. W. 4, acting at the instance of Inspector Mohammad Hanif, P. W. 3. These three persons along with a number of others went to the platform sometime before the train was due to leave, and while Mr. Bahi taking his luggage with him went forward and spoke to the Ticket Collector who was on duty, namely Anwar Ali, the Inspector and Magistrate stayed at a distance watching what was going on, but too far away to hear what passed between Mr. Bahi and the Ticket Collector. They saw Bahi putting his luggage into a vacant second class compartment, and then giving Rs. 5 to the Ticket Collector who proceeded towards the guard's van. Thereupon they came up and stopped the accused and recovered the money which he had obtained from Mr. Bahi, which proved on check to be the very notes

which had been furnished for the purpose of the trap to Mr. Bahi. One other witness to the same effect is a Head Constable, Rattan Singh P. W. 6. As to the conversation which passed between Mr. Bahi and the accused, Mr. Bahi's is the only statement for the prosecution. He said that the accused asked him to wait at first and later told him to take his luggage to a certain second class carriage in the centre of the train where the accused arrived later and pointed out a four-berth compartment which was then vacant. The accused asked the coolie to put Mr. Bahi's luggage in this compartment and then went away. He came back after 15 minutes and then demanded Rs. 5 from Mr. Bahi which the latter paid. After this the accused was going towards the guard's van when he was stopped by the Magistrate and the police officers.

[3] The accused put up an alternative case at the very outset, and it is somewhat regrettable that the Magistrate who was in charge of the proceedings did not choose to investigate his plea, for although the Magistrate said he could not remember if when the notes were recovered from him, the accused said the money had been given to him as excess fare for providing a first class seat, he admitted that there were one or two well-dressed gentlemen on the spot who were siding with the accused and saying that they had heard what happened. Three of these persons have appeared as defence witnesses, namely Hony. Lt. Dr. Abdul Hamid, I. A. M. O., D. W. 1, Nihal Chand D. W. 4 and Prof. R. D. Bhalla, D. W. 5, all of whom are strangers to the accused, but felt so strongly that he was in the right that they actually gave him their names and addresses before leaving the spot, having first made an unsuccessful effort to place their knowledge of what had occurred before the authorities. A document Ex. D. W. 5/A has been produced on which Prof. Bhalla wrote his name as well as that of Nihal Chand his friend whom he had accompanied to the railway station to see off by that very train and Dr. Hamid also wrote his name and address on the same piece of paper. As was natural, after the capture of the accused, the Station Master had to be summoned. This was Mr. D. Bejon, P. W. 5, in whose office the Magistrate and the Inspector conducted a part of the investigation. His statement is not wholly satisfactory, for in one place he said that the only version placed before him by Anwar Ali was that the notes had been picked up from the ground and not taken from his pocket, but later in his examination-in-chief he gave the following reply :

"It is correct that the accused stated at the time before me that he had received some money from certain passenger for converting his ticket into higher class.

The form of the answer indicates that the question was put in leading form, and it is therefore surprising to find that later the prosecution cross-examined Mr. Bejon as a hostile witness because he had given this answer. In a report, Exh. P. J. which Mr. Bejon wrote after the incident was over, he did not mention the matter of conversion of the ticket, but a perusal of this report shows that it did not purport to contain a full account of everything said by Anwar Ali, or even the views of the Station Master himself as to what had actually happened.

[4] The weakness of the prosecution case as has been indicated already, consists in the fact that the statement of Mr. Bahi as to the reason why Anwar Ali took the money from him is not corroborated by any other evidence, oral or circumstantial. All the evidence for the prosecution conveys the impression that it was considered sufficient for establishing a case of bribery against the accused, that it should be proved that the marked notes passed from Mr. Bahi to him. Obviously, that is in fact not sufficient for establishing such an offence. Money may be passed from one person to another on a variety of pretexts, and it cannot be remembered too carefully that persons who lend themselves for use as decoys and agents provocateur possess ingenuity and suppleness of wit above the ordinary. No stupid or simple person could ever hope to perform such a function. Therefore, it is of the utmost importance in cases of this kind that there should be independent corroboration of the statement of the decoy witness, that the money was received by the accused person for an illegal purpose. Naturally, the decoy witness will be extremely keen that his trap should not fail, and having in the forefront of his mind that the central thing is that the marked money should be passed to the intended victim, and assuming a certain elasticity of moral character in the decoy witness, there is a real danger that he may pass on the money under some pretext which may perhaps not be guilty in the relevant sense or which may even be wholly innocent, but in giving his evidence may represent that he gave the money for the purpose relevant in the case, feeling confident that having taken care that the money was passed with as little publicity as possible; the case on this particular point will resolve itself into a conflict between his evidence on solemn affirmation and the statement of the accused person which must necessarily be made without an oath. If the prosecution had wished, there can be no doubt that they could have arranged for some person or persons to be within earshot of Mr. Bahi and the Ticket Collector throughout the proceedings. On a crowded platform, there need have been nothing

to excite the victim's suspicions if one or two other persons had been standing close to him at the same time as Mr. Bahi. I find it difficult to avoid the conclusion that in this case the prosecution were not interested to obtain such evidence, for, it seems that the refusal to listen to persons like Prof. R. D. Bhalla and the other two defence witnesses who were willing to testify in favour of the accused person on the spot, could hardly have been unintentional. The evidence of these three defence witnesses is perfectly clear and goes uniformly in favour of the accused. It will be sufficient to state briefly the substance of Prof. Bhalla's evidence, which is contained in a lengthy and circumstantial statement bearing on its face the appearance of absolute truth. He stated that his companion Nihal Chand also wanted a berth, and the two of them were talking to Anwar Ali when Mr. Bahi turned up and said that if no berth could be found for him in a second class compartment, his ticket might be converted into a first class ticket up to Ferozepore Cantonment, from which place he would make other arrangements for a seat. Mr. Bahi then gave some one-rupee notes to Anwar Ali who had told him that the extra fare would be between Rs. 4 and 5. Anwar Ali asked him to go with him to the guard who would change the ticket, but Bahi made an excuse saying that he wanted to give instructions to his coolie. Then Anwar Ali walked to the guard's van and back accompanied by Prof. Bhalla and Nihal Chand who were still pressing for a berth for the latter, when the Magistrate and the police officer stopped him and recovered the money from him. Anwar Ali at once said that he had taken the money from Mr. Bahi for giving him a better class ticket, and this was supported by Nihal Chand but the Magistrate said that his information was that the money had been taken as a bribe, and the accused could put forward his plea in Court. Prof. Bhalla attempted to enter the Station Master's office while the enquiry was going on there, but was prevented from doing so, when the party came out he supplied his name and address as well as that of Nihal Chand to the accused.

[5] Thus, on the one point which was of importance in the case, namely, the pretext under which the money was passed by Mr. Bahi to the accused the defence provide direct evidence of respectable and reliable persons to establish that the money was taken innocently by the accused, while on the other hand, the prosecution appear deliberately to have avoided producing any evidence. At the hearing of the appeal, learned counsel for the Crown placed great stress on the fact, proved by the evidence of the Magistrate corroborating Mr. Bahi, that the latter's luggage

was placed in a second class compartment before the money was handed over. It is true that this act conveys the impression that the arrangement was that Mr. Bahi should occupy a berth in that compartment, and Mr. Bahi states that he was told to give the name Karim, which was one of the names on the reservation label outside the compartment. However, that compartment was vacant at that time, and it is well known that passengers who have made no reservations frequently enter vacant compartments before those who are entitled to the berths in that compartment arrive, and in such cases the early comers have to be ejected often with some degree of unpleasantness. It is also clear that if a passenger who has not reserved a berth is hoping to find a berth vacant in some compartment on account of the person who reserved it not turning up, his best hope lies in appropriating the seat to himself well in advance, so as to be the first claimant to any seat which ultimately remains vacant. The indications are that on that day, the four passengers in whose names the berths in the compartment in question had been booked did actually travel in that compartment. Consequently, the circumstance that Mr. Bahi put his luggage in a second class compartment does not exclude the possibility of his negotiating with the Ticket Collector for a seat in a first class compartment. It was argued that if he were in fact negotiating for such a seat, then having paid Rs. 5 in advance to the Ticket Collector he should have gone with him to the guard instead of hanging back. This might have been his attitude if he were a genuine traveller, but the fact is that he never intended to travel by that train, and his business was over when he had passed the money to his victim.

[6] In my opinion, the charge against the respondent was not established in the case beyond reasonable doubt and he has, therefore, been rightly acquitted. I would accordingly dismiss this appeal.

Falshaw J.—I agree.

D.S.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 30 [C. N. 10.]

MARTEN J.

Ganpat Rai — Petitioner v. Emperor.

Criminal Revn. No. 2392 of 1946, Decided on 3-3-1947, from order of Magistrate, First Class, Lahore, D/- 17-9-1946.

Companies Act (1913), S. 282 — Prosecution under — Regulation of 1910 of Punjab Government — Prosecution by private individual against officer of Company — Validity.

The modifications brought about in existing Indian laws by the Government of India (Adaptation of Indian Laws) Order, 1937, do not render invalid any regulation duly made or issued before the commencement of that

Order and any regulation so made or issued continues intact until actually revoked. The regulation of 1910 issued by the Punjab Government under S. 220, Companies Act as it then stood has never been revoked either by the Central or Provincial Government and the powers vested thereby in the Registrar to institute prosecutions are entirely valid at the present time. Hence a prosecution under S. 282, Companies Act against an officer of a company by a private complainant who has no status in the company is invalid. 29 A. I. R. 1942 Mad. 283, *Disting*; 8 I. C. 190 (Lab), *Ref.* [Paras 3 and 4]

Cases referred :—

1. ('42) 29 A. I. R. 1942 Mad. 283 : 202 I. C. 28, *Muthu Veeran Chettiar v. Mottayan Chettiar.*
2. ('42) 29 A. I. R. 1942 Sind 9 : 198 I. C. 95, *Emperor v. Vishwanth B. Patel.*
3. ('10) 11 Cr. L. J. 577 : 8 I. C. 190 (Lab), *Emperor v. Shiv Das.*
4. ('36) 17 Lah. 629 : 23 A. I. R. 1936 P. C. 253 : 63 I. A. 372 : 163 I. C. 881 (P. C.), *Nazir Ahmad v. Emperor*

K. S. Qalander Ali Khan and Dwarka Das Kapur — for Petitioner.

Ram Narain — for Sohan Singh (Respondent.)

Order. — This is a petition against the order of a Magistrate, 1st Class, Lahore, before whom the petitioner was being prosecuted under S. 282, Companies Act at the instance of Sohan Singh respondent. The petitioner had taken the plea that the petition by Sohan Singh was incompetent in law but this has been overruled by the learned Magistrate and the petitioner has now come to this Court praying for the reversal of that order.

[2] In the complaint made against the petitioner a number of allegations for mismanagement and fraud are alleged but it is not necessary to state them here in detail since the point with which I am concerned, is purely legal. It is urged on behalf of the petitioner that the effect of Regn. 4 of the Regulations framed by the Punjab Government and published in their notification No. 691 of 10th June 1914 is to restrict the right of instituting prosecutions under S. 282, Companies Act, to the Registrar, Joint Stock Companies, or any person duly authorized by him; therefore a petition by a private complainant such as Sohan Singh, who has no status in the Company, is invalid. Before the learned Magistrate it was urged by counsel for the complainant that this Regulation was made before the advent of the present Government of India Act which has vested the powers of making rules under the Companies Act in the Central Government, therefore this regulation, which was made by the previous Local Government and has not since been amended or specifically adopted by the Central Government, is now invalid. Further, that there is nothing in the Companies Act itself which would restrict the ordinary powers of a private individual to make a complaint to a Magistrate. In support of this contention he relied on a Madras High Court ruling, A. I. R. 1942 Mad. 283.¹

[3] In 1883, the Lieutenant-Governor of the Punjab, acting under the provisions of S. 220, Companies Act as it then stood, issued a Regulation in para. 5 of which it is provided *inter alia* that the Registrar shall be deemed the proper officer for instituting and conducting all prosecutions under the Act. This was followed in 1910 by another Regulation framed under the same section, which provided that he (the Registrar) or any person duly authorised by him, may institute and conduct any prosecution under the Act. It seems clear that it was undoubtedly the intention of the Government, as expressed in these two regulations, to confine the power of instituting prosecutions under the Act to the Registrar or any one authorized by him. The intention of the Regulation was to provide two classes of persons empowered to institute prosecutions under the Act, the first the Registrar himself, and the second, his duly authorized agent. If a third be now added, namely, anybody else who likes, it is obvious that the effect of these regulations in restricting this power to the first two would be entirely vitiated. The rule-making section in the Companies Act as subsequently amended, is S. 248 (2), which empowers the Local Government to appoint Registrars and make regulations with respect to their duties. It has not been urged before me on behalf of the respondent that a regulation similar to those I have quoted could not have been made under this section. The objection taken is that the Act as now amended by the Adaptation of Indian Laws Order, confers the power to make such regulation on the Central Government and it is urged that since the Central Government has neither made any similar regulation itself, nor certified that it has adopted the existing regulation, this regulation is void since the commencement of the present Government of India Act. This is, of course, not so. A reference to Clauses 9 and 10 of the Government of India (Adaptation of Indian laws) Order, 1937 will show clearly that the modifications brought about in existing Indian Laws by the Order do not render invalid any regulation etc. duly made or issued before the commencement of that Order and any regulation so made or issued can only be revoked by the competent authority. That is to say, it continues intact until actually revoked. The regulation in question has never been revoked either by the Central or Provincial Government.

[4] Further, clause 10 of the Order provides that all powers which were created by any law existing before the relevant date and were vested in, or exercised by any person or authority, shall continue to be so vested or exercised until provision is made by some legislature or authority

empowered to regulate the matter in question. This means that the powers vested in the registrar or his duly authorised agent to institute prosecutions under the Companies Act, remain intact until the proper authority takes steps to modify them. No such steps have been taken. In my view, therefore, the Regulation of 1910 is in full force and the powers vested thereby in the Registrar to institute prosecutions, are entirely valid at the present time. The Madras ruling relied upon by the lower Court and also by learned counsel for the respondent before me, depended upon the wording of the equivalent regulation in existence in Madras. I have read this. It provides that when it is found necessary to enforce the penal provisions of the Act against any Company the Registrar or Assistant Registrar as the case may be, shall request the Government solicitor if the registered office of the Company in default is situated at Madras, or in other cases the Magistrate of the district in which the registered office of the Company is situated, to take the necessary steps. This regulation is widely different in terms from that in existence in the Punjab. There is nothing in the wording of it restricting the power to institute prosecutions under the Act. In my view, therefore, the Madras ruling can be easily distinguished on these grounds. My attention has also been drawn to a ruling of the Sind Judicial Commissioner's Court, A. I. R. 1942 Sind. 9² which refers to prosecutions under S. 282 of the Act, but in that order no reference is made to any regulation made by the Sind Government. On the other hand, it was held by the Punjab Chief Court in 11 Cr. I. J. 577³ in discussing the regulation then in existence under S. 220, Companies Act, that whereby any law or regulation a certain person only is authorized to complain about a particular offence, the proceedings of a Magistrate based on a complaint relating to that offence, made by any unauthorized person, are *ultra vires* and liable to be set aside on revision. The regulation then in existence was that of 1883 and empowered only the Registrar to institute prosecutions. The only material difference between that Regulation and the regulation of 1910 is that the Registrar has by the latter, been authorized to empower an agent to do so on his behalf. I have already given my reasons for deciding that no other class of persons is empowered. Sub-section (2) of S. 1 read with sub-s. (2) of S. 5, Criminal P. C. clearly provides that the procedure laid down in that Code does not apply to special laws in which special provisions for investigation etc. of offences created by them, appear. The Privy Council has held in 17 Lah. 629⁴ that it is a well recognised rule of construction that where a power is given to do a certain thing in a certain way, that

thing must be done in that way or not at all; other methods of performance are necessarily forbidden. In my view, therefore, the complaint by Sohan Singh, a private individual with no official status in the Company, against that Company or its officers is invalid. I, therefore, accept this petition and setting aside the order of the lower Court quash the proceedings.

D.S.

*Petition accepted.***A. I. R. (35) 1948 Lahore 32 [C. N. 11.]**

KHOSLA J.

Jawahar Ali — Defendant — Appellant v. Ram Ditta Mal and another — Plaintiffs — Respondents.

Second Appeal No. 1439 of 1945, Decided on 20-2-1947, from decree of Dist. Judge, Jullundur, D/- 31-3-1945.

Punjab Relief of Indebtedness Act (7 [VII] of 1934), S. 25 — Scope — Suit for possession of mortgaged property and in alternative for money decree — Stay of.

Section 25 only bars suits or other proceedings brought for the recovery of any debt if an application in respect of such debt has been made to the Board. It does not deal with other reliefs such as the possession of the property which may be claimed by a plaintiff in a civil suit. Hence where a mortgagee brings a suit for possession of the mortgaged property with an alternative prayer for a money decree, the latter relief may be denied to the plaintiff by virtue of S. 25 but the relief as to possession can be enquired into and granted by the Court if the plaintiff is able to prove his case. The civil Court is not bound to stay the proceedings with respect to it under S. 25. [Para 2]

Roop Chand — for Appellant.

S. D. Bahri — for Respondents.

Judgment.—The circumstances which have given rise to this appeal are briefly as follows. On 19-1-1937 the appellant executed two mortgage deeds in favour of the respondents, each for a sum of Rs. 99. The mortgages were with possession. On 12-2-1941 the respondents brought a suit for the possession of the mortgaged property alleging that possession had not in fact been transferred to them. In the same suit they claimed a decree for the recovery of the money by way of alternative relief. The debtor on 5-3-1941 made an application to the local Debt Conciliation Board for the cancellation of the debt. On 21-11-1941, the Board declared that there was no debt due from the appellant under S. 15-A, Punjab Relief of Indebtedness Act. The civil suit was decided on 14-4-1942 and the trial Court held that the order of the Board was correct. This decision was reversed on appeal by the learned Senior Subordinate Judge on 22-4-1943. The learned Senior Subordinate Judge held that the decision of the Board was *ultra vires* and remanded the case for a fresh decision. On 13-12-1943, the debtor Jawahar Ali made another application to the Board and on 2-2-1944 the Board

sent the usual intimation to the civil Court. The civil Court, however, decided not to stay the proceedings and as Jawahar Ali himself was absent passed an *ex parte* decree for the possession of the mortgaged property. An appeal against this order was preferred by Jawahar Ali and this appeal was dismissed by the learned District Judge. A second appeal has now been filed to this Court.

[2] The learned counsel for the appellant argued that as soon as the Board communicated the fact of an application having been made to it, the civil Court should have stayed the proceedings and all further proceedings were *ultra vires*. On the other hand, it is contended by Mr. Som Dutt who appeared on behalf of the respondents that the Board had no jurisdiction to go into the question whether the plaintiffs could ask for the possession of the mortgaged property, and the suit of the plaintiffs was not a suit for the recovery of a debt. It was a suit for the possession of the mortgaged property although by way of alternative relief they had claimed a money decree also. Mr. Som Dutt argued that so far as the claim for the possession of the mortgaged property was concerned, the civil Court acted rightly in proceeding with the suit. This argument has considerable force. Section 25, Punjab Relief of Indebtedness Act, only bars suits or other proceedings brought for the recovery of any debt if an application in respect of such debt has been made to the Board. Section 25 does not deal with other reliefs such as the possession of the property which may be claimed by a plaintiff in a civil suit. Mr. Roop Chand for the appellant argued that there could be no partial stay of the suit and that as the plaintiffs had at the same time asked for a money decree the proceedings should have been stayed as a whole. It is to be observed that the decree passed by the trial Court was for the possession of the mortgaged property and there was nothing in this decree which violates the provisions of S. 25, Punjab Relief of Indebtedness Act. Where a plaintiff claims alternative reliefs one of those reliefs may be barred by law while the other relief may be admissible and the Court will grant the relief which is admissible and refuse to grant the relief which is not admissible by the operation of any law. It may be argued that the relief in respect of possession is so connected with the debt that the entire suit must be said to be a proceeding in respect of such debt. But the wording of S. 25 is that "no civil Court shall entertain any new suit or other proceeding brought for the recovery of any debt". The words underlined (here italicised) by me define the scope of S. 25 and only suits in which the recovery of any debt is sought are barred. If two alternative reliefs

are claimed in a suit one of these reliefs may be denied to the plaintiff by virtue of S. 25 of the Act while the other may be admissible and there can be no objection to the Court enquiring into the second relief and granting it if the plaintiff is able to prove his case. I, therefore, hold that the learned trial Judge acted rightly in refusing to stay the suit and proceeding with the enquiry with regard to the possession of the mortgaged property. This appeal, therefore, fails and I dismiss it with costs.

K.S.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 33 [C. N. 12.]
FULL BENCH

ABDUL RASHID, AG. C. J., RAM LALL,
 MAHAJAN, ACHHRU RAM AND KHOSLA JJ.

Alam Khan—Petitioner v. Emperor.

Criminal Misc. Nos. 517, 537 and 577 of 1944, Decided on 3-4-1946, from the judgment of Harries, C. J., and Khosla J., D/- 22-6-1945.

(a) Frontier Crimes (Validation of Acts, Orders and Proceedings) Act (Punjab Act 7 [VII] of 1944) and Frontier Crimes (Validation of Acts, Orders and Proceedings) Ordinance (Punjab Ordinance 1 of 1944)—Whether *intra vires*—Acts, orders and proceedings therein referred to if validated.

In exercise of the powers conferred by the Indian Councils Act 1870, Regulation, IV of 1887 was passed. Some portions of the Regulation were of general application and others could be enforced against such classes of persons as the Local Government may by notification direct to be subject thereto. In pursuance of this power, Notification No. 1156 was issued on 5-11-1887 whereby the Lieutenant-Governor declared certain specified classes of persons to be subject to the whole Regulation. Subsequently, this Regulation of 1887 was repealed and replaced by Regulation III of 1901 which contained a similar provision for extending the non-general sections to any class of persons but no fresh notification was issued under the Regulation of 1901. A Full Bench of the Lahore High Court decided that the Regulation of 1901 had been re-enacted with material modifications and therefore the notification under the Regulation of 1887 was no longer in force after the repeal of that Regulation. The effect of the decision was that it rendered a large number of convictions illegal and it became necessary to validate the various acts performed in the belief that a valid notification existed applying the 1901 Regulation to the Districts to which the 1887 Regulation applied. To remedy this defect, the Governor of the Punjab promulgated Ordinance No. I of 1944 which was subsequently replaced by Punjab Act 7 [VII] of 1944. The question was whether the Ordinance and the Act were valid pieces of legislation.

Held (1) that the Regulation made in pursuance of powers given by the Councils Act, 1870 was not an Ordinance, and therefore, no question arose of altering or amending an Ordinance which would attract the provisions of S. 108 (1) (b), Constitution Act. [Para 7]

(2) that the issuing of notification making the Regulation applicable to certain areas or classes of persons in the areas to which the Regulation had been made applicable was within the discretion of the Local Government and if they could have issued notifications they could give retrospective effect to those notifications and it cannot be said that thereby they have made a provision which repeals, amends or is repugnant to the

provisions of an Act of Parliament which gave power to the Governor-General to make laws under which the Local Governments could issue these notifications, as contemplated by S. 108 (1) (a), Constitution Act.

[Para 7]

(3) that the subject-matter of the Frontier Crimes Regulation did not fall within the scope of the Exclusive Provincial List as given in Sch. 7, Government of India Act.

[Para 8]

(4) that Punjab Act 7 [VII] of 1944, in so far as it validates acts done in relation to offences under the Indian Penal Code security proceedings and the like which would have been valid if a notification on the lines of notification 1156 of 15-11-1887, had issued after the Regulation of 1901 came into force, comes within the items enumerated in the Concurrent Legislative List (List 21) given in Sch. 7, Government of India Act inasmuch as item 1 relating to Criminal Law, item 2 relating to Criminal Procedure and item 15 dealing with jurisdiction and powers of all Courts with regard to matters included in items 1 and 2 embrace all actions taken in relation to the cases under S. 11 of the Regulation. [Para 9]

(5) Hence the Provincial Legislature is not debarred from legislating with regard to this subject, and both the Ordinance I of 1944 and Act 7 [VII] of 1944 are *intra vires* with the limitation that except to the extent where, if at all, the exclusive sphere of the Federal legislature is encroached upon, the legislation is void to the extent of the encroachment. [Paras 9 & 22]

(6) *Per Full Bench (Abdul Rashid Ag. C. J. dissenting.)*—The Ordinance and the Act as worded however do not validate the orders, proceedings and acts therein referred to. [Para 22]

Per Abdul Rashid, Ag. C. J.—The Validating Act not only made the omission to issue a notification similar to notification No. 1156 immaterial, but it also validated acts which had been done by the Provincial Government or by any authorities subordinate thereto in the belief that they were acting in exercise of the powers conferred by the provisions of the Frontier Crimes Regulation, 1901. [Para 29]

The Ordinance and the Act validate all orders made, proceedings taken and acts done upto 22-12-1944. They do not validate any orders made, proceedings taken and acts done after 22-12-1944. [Para 29]

(b) Frontier Crimes Regulation (3 [III] of 1901)—Extent of applicability—Effect of Punjab Ordinance I of 1944 and Punjab Act 7 [VII] of 1944, explained: 8 P. R. 1903 Cr.; 2 A.I.R. 1915 Lah. 355 and Criminal Misc. No. 589 of 1944, **OVERRULED**.

It was not the intention that the Regulation should attach to a geographical tract in the sense in which an easement or other similar liability attaches to a particular piece of land irrespective of the change of ownership. [Para 13]

The Regulation was not expressed to apply and so did not in fact apply to a tract of land covered by the six named districts; it was intended to apply to six administrative units and only officials attached to those units were given powers to act within their area of jurisdiction and therefore when for any reason whatever any portion went out of the jurisdiction of these six named districts the Regulation ceased to apply. [Para 20]

The effect of Punjab Ordinance No. I of 1944 and Act No. 7 [VII] of 1944 was that in those districts in which the Regulation was in force by its own operation but in which the notification extending it to certain classes of persons had not been issued, then any action taken under the Regulation in those districts would be just as valid as if a notification on the lines of notification 1156 had in fact been issued. But if the Regulation itself did not apply to a district, a notification

bringing certain persons resident in that district within its operation, cannot have the effect of making the Regulation as such, in force in that district. [Paras 20, 22]

Where, therefore, a portion of some district or districts has ceased to remain within those six districts to which the Regulation applied, then the issue or the failure to issue of such a notification does not affect the position in the portion so cut out. The area now covered by the district of Mianwali, while it remains in this district by this name cannot be said to be part of the six districts to which the Regulation ever applied or was meant or intended to be applicable. A notification on the lines of notification 1156 would not make the Regulation applicable to the district of Mianwali which has gone out of the six named districts and is no longer part of them. As from the date of the creation of the new District of Mianwali the Regulation itself ceased to apply to it and any action taken under the Regulation was, therefore, void so far as that district was concerned, and the ordinary law of procedure which the Regulation changed and modified would continue to have operation and effect and any Order which purported to have been passed would be deemed to have been passed under the ordinary law before it was modified and so subject to the revisional jurisdiction of the High Court: 8 P. R. 1903 Cr; 2 A. I. R. 1915 Lah. 355 and Criminal Misc. No. 589 of 1944, *OVERRULED*; 32 A. I. R. 1945 Lah. 99, *Expl.* [Paras 20 & 22]

(c) Criminal P. C. (1898), S. 491—Petition under, by complainant if competent.

The language of S. 491 places no limit on the class of person or persons who can move a High Court with relation to a person in custody and if the High Court on hearing the petition thinks fit to do so may make an order that he be dealt with according to law. Such a petition at the instance of a complainant is, therefore, competent. [Para 23]

Cases referred:—

1. ('45) 32 A. I. R. 1945 Lah. 65; 222 I. C. 28 (F. B.), Hari Singh v. Emperor.
2. ('03) 8 P. R. 1903 Cr, Game Shah v. Emperor.
3. ('15) 25 P. R. 1915 Cr; 2 A. I. R. 1915 Lah. 355; 31 I. C. 646, Bhola Ram v. Emperor.
4. ('45) 32 A. I. R. 1945 Lah. 99; 228 I. C. 32, Mahomed Khan v. Emperor.
5. Criminal Misc. No. 589 of 1944, D/- 23-3-1945, Jan Mahomed v. Emperor.

Gopal Singh—for Petitioner.

B. K. Khanna, Advocate-General, Punjab—for the Crown.

Opinion of the Full Bench

Ram Lall J.—Three questions have been referred to a Full Bench. These questions arose out of a number of Criminal Revision petitions in which initially certain criminal cases were pending before the ordinary Criminal Courts but these were withdrawn by the Deputy Commissioner of Mianwali and sent to a Council of Elders for a finding under the provisions of S. 11, Frontier Crimes Regulation 1901. In Criminal Miscellaneous No. 517 there is a petition under S. 491, Criminal P. C., for the production of Alam Khatoon and Alam Sher who were originally challaned under S. 302, Penal Code. The case was withdrawn from the Committing Magistrate's Court and sent to a Jirga or Council of Elders on whose report the accused were sentenced to 14 years' rigorous imprisonment each. It is alleged that the detention

of these persons is unlawful as no valid notification exists applying the Frontier Crimes Regulation to the district of Mianwali and therefore, the orders of Deputy Commissioner, Mianwali are *ultra vires* and inoperative. In Criminal Miscellaneous No. 537 of 1944 one Hukam Chand is undergoing a similar sentence and the contention and the prayer is the same. In Criminal Miscellaneous No. 577 of 1944 the case against 11 men was withdrawn from the Court of the Committing Magistrate and sent to a Jirga. A Full Bench of this Court reported as A. I. R. 1945 Lah 65¹ had held that there was no valid notification applying the Frontier Crimes Regulation of 1901 to the Mianwali District and the case of the 11 men was sent to the Judicial side. Subsequent to this decision by the Full Bench, the Governor of the Punjab promulgated an Ordinance 1 of 1944 which was replaced by Act 7[VII] of 1944 of the Punjab Legislature which purported to validate the defect pointed out by the Full Bench. On 17-6-1944 the case was again withdrawn from the Judicial side and remitted to a Jirga. The complainant in this petition prays that the Frontier Crimes Regulation is not applicable, that the Ordinance 1 of 1944 and Act 7[VII] of 1944 are *ultra vires*, and therefore, the persons accused should be ordered to be produced before this Court under S. 491, Criminal P. C. and they be ordered to be dealt with according to law.

[2] There are other petitions under S. 526, Criminal P. C. (Criminal Miscellaneous Nos 4054 and 1057) in which the contention is raised that the Regulation not having been applied to Mianwali District subsequent proceedings are *ultra vires* and of no effect. In one case (Criminal Miscellaneous No. 552 of 1945) a person against whom a case under S. 302, Penal Code had been withdrawn and sent to a Jirga, now prays for bail. In Criminal Revision No. 1140 of 1945 a chalan was presented in the Court of the Additional District Magistrate, Mianwali under Ss. 40/41 dealing with security proceedings of the Frontier Crimes Regulation, and it is contended that the Additional District Magistrate has no jurisdiction to try the case as the Regulation does not apply to this district.

[3] The three questions formulated for the decision of the Full Bench are: (1) Whether the Punjab Ordinance 1 of 1944 and the Punjab Act 7 [VII] of 1944 are *ultra vires* or not? (2) If the answer is in the negative, does the Ordinance and Act validate the orders, proceedings and Acts therein referred to? (3) Does a petition under S. 491 Criminal P. C. lie in a case such as Criminal Miscellaneous No. 577 of 1944? It will be noticed that in all the petitions before this Court offences under the Penal Code

are involved or they concern security proceedings. The main question is what procedure shall be employed in the trial of these offences and in one petition the question is whether it is open to a complainant to move the High Court for a writ under S. 491, Criminal P. C. In answering the first question it is necessary to examine the circumstances in which the two enactments came to be made, what defect they intended to remedy and how far they succeeded in doing so.

[4] On 25-3-1870, the Indian Councils Act became law, and it gave power to Governors of Provinces to propose drafts of regulations for peace and good Government to the Governor-General in Council and he could, if he approved these drafts, give his assent and publish them in the official gazette and they could then become law under the authority of the Governor-General. Various regulations were so made from time to time till Regulation IV of 1887 was passed, which repealed and replaced the earlier regulations on the subject. Eventually, the Regulation of 1887 was repealed and replaced by Regulation III of 1901. The Regulation of 1887 provided that it was to come into force on a date appointed by the Local Government. By Notification No. 245, 10-3-1887, was the date fixed when the Regulation came into force. The Regulation extended by its own operation to the districts of Peshawar, Kohat and Hazara and power was given to the Local Government to extend it by Notification wholly or in part to the whole or any part of the districts of Bannu, Dera Ghazi Khan and Dera Ismail Khan. In exercise of this power, the Local Government issued Notification No. 626 whereby all the provisions of the Regulation were extended to these three districts with the result that as from this date the Regulation was made applicable to all the six districts mentioned above.

[5] Some sections of the Frontier Crimes Regulation of 1887 were of general application and others could be enforced against such other classes of persons as the Local Government with the previous sanction of the Governor-General in Council, may, by notification in the official gazette declare to be subject thereto. In pursuance of this a Notification No. 1156 was issued on 5-11-1887 whereby the Lieutenant Governor with the previous sanction of the Governor-General in Council declared that Pathans, Baluch, and non-European British subjects ordinarily resident in the districts to which the Regulation applied, their dependents, servants and others jointly concerned with them in the commission of offences were henceforth subject to the whole of the Regulation. When the 1901 Regulation was re-enacted it contained similar

provision for extending the non-general sections to any class of person but no fresh notification was issued under the new Regulation. A question arose whether the Notification No. 1156 applying the provisions of the Regulation to classes mentioned in that notification, was kept alive by the provisions S. 24 of the General Clauses Act. It was held by a Full Bench consisting of Beckett, Rahman and Marten JJ. that the Regulation of 1901 had been re-enacted with material modifications and therefore a notification under the old Regulation was no longer in force after the repeal of that Regulation. The effect of this decision was that it rendered a large number of convictions illegal and it became necessary to validate the various acts performed in the belief that a valid notification existed applying the Frontier Crimes Regulation of 1901 to the districts to which the previous notification under the Regulation of 1887 applied. An Ordinance was therefore promulgated and later the Punjab Legislature passed an Act to remedy the defect pointed out by the Full Bench. The language of the Validating Ordinance and the Validating Act, is identical. It is provided that:

"All orders made, proceedings taken and acts done... which were made, taken or done, or which purported to be made, taken or done, in the exercise of powers derived from the provisions of the Frontier Crimes Regulation 1901 by virtue of Punjab Government Notification No. 1156 dated 15-11-1887 or in execution of or in compliance with any orders made or sentences passed by the Provincial Government or by any authority subordinate to the Provincial Government in the exercise or purported exercise of powers as aforesaid shall be deemed to be and always to have been validly made, taken and done... and all such orders, proceedings and Acts shall be as good and valid as if the said notification had issued under the provisions of S. 1 of the said Regulation" (of 1901).

[6] What this new provision seeks to do is to make the acts done and sentences passed as valid and effective as they would have been if a notification under the 1901 Regulation had in fact been issued. Two questions arise here, the first is whether the Punjab Legislature (or the Governor of the Punjab who has co-extensive powers to legislate by ordinance) could validly legislate on this subject under the Constitution Act of 1935, and the second is whether the effect of this legislation is to make it operative in areas to which the notification itself did not and could not apply.

[7] So far as the first question is concerned, the argument of Gopal Singh is that the subject matter of the Regulation is such that only the Central Legislature can deal with it and that previous sanction of the Governor-General is necessary before legislation on the subject can be taken in hand. The argument, so far as it was intelligible, was that S. 108 (1), Government of India Act, required previous sanction of the Governor-General because Act 7 [VII] of 1944,

sought to repeal, amended or was repugnant to an Act of Parliament or a Governor-General's Act. It appears to me that there is no force in his contention. In so far as the objection was based on the language of S. 108 (1) (b), learned counsel was under the confused and erroneous impression that a Governor-General's Act was an Act, which before the Constitution Act, had been passed into law with the consent of the Governor-General. Governor's Acts and Governor-General's Acts are special enactments in peculiar circumstances stated in Ss. 90 and 44, Constitution Act and have nothing to do with the matter here under discussion. Equally obviously a Regulation made in pursuance of powers given by the Councils Act, 1870, is not an Ordinance, and therefore, no question arises of altering or amending an Ordinance which would attract the provisions of S. 108 (1) (b), Constitution Act. So far as the argument rests on S. 108 (1) (a) the contention was that the Indian Councils Act, 1870, was being amended or that the Act of the Punjab Legislature was repugnant to its provisions. The 1870 Act empowered the Governor-General to take drafts of resolutions into consideration and if he agreed, to publish the same, and give them the force of law. The Frontier Crimes Regulation of 1887, as also the Frontier Crimes Regulation of 1901, came into being in accordance with the provisions of this Act of Parliament. There is in the body of the Regulation a provision whereby the Local Governments can issue notification making the Regulations applicable to certain areas or classes of persons in the areas to which the Regulation has been made applicable. The issuing of notifications of this kind is within the discretion of the Local Governments and if they could have issued notifications they could give retrospective effect to those notifications and it cannot be urged that thereby they have made a provision which repeals, amends or is repugnant to the provisions of an Act of Parliament which gave power to the Governor-General to make laws under which the Local Governments could issue these notifications.

[8] The learned Advocate-General on the other hand, contended that the subject matter falls within list II of the Legislative List. His contention was that what the Punjab Act had done was to legalize sentences passed and this was covered by item 1 of the Provincial List. This item deals with Public Order, the constitution and organization of Courts and administration of justice. The term 'public order' when used in its widest sense would embrace nearly every administrative and legislative activity of Government. If the term was to be interpreted in this sense, there was no necessity to give various other heads that follow. Similarly, a number of items

which fall within the Federal Legislative List would fall within the scope of the term 'public order' so interpreted. I find it impossible to accept the contention that because a piece of legislation tends to promote or maintain public order, it falls within the exclusive sphere of the Provincial Legislature. Much the same is the position with regard to the terms 'administration of justice' and 'constitution of Courts' in item 1 of this List. To my mind, all that was intended was that legislation which regulated the constitution and organisation of Courts and administration of justice therein was the exclusive concern of the Provincial Governments and legislatures but where the legislation was such as trenching on the exclusive sphere of the Federal Legislature, the Provincial Legislatures had no power to legislate. It is to be observed that the Concurrent List 3 enumerates a number of items in which either legislature can function subject to the limitations on the Provincial Legislature contained in Ss. 100 and 107 of the Act. Items 1, 2 and 4 of this list deal with Criminal Law, Criminal Procedure and Civil Procedure Code. If the term, Public Order, is to be given the meaning which the learned Advocate-General places upon it, these items would fall within the Exclusive List 2 and oust the jurisdiction of the Federal Legislature. Further items 29 and 30 in List 1 deal with arms and explosives. This means that the Central Legislature alone can legislate concerning these subjects. It is obvious that the object of legislation under these heads would be in the interest of public order and yet *qua* these subjects the jurisdiction of the Provincial Legislatures is excluded. I am of the opinion that the subject-matter of the Frontier Crimes Regulation cannot fall within the scope of the Exclusive Provincial List.

[9] The portion of the Frontier Crimes Regulation with which we are concerned is the alteration of the rules of Criminal Procedure or sentences under the Penal Code. In some of the cases out of which these references have arisen, the offences alleged were those enumerated in the Penal Code, in others security was demanded under provisions which are analogous to those in Chap. 8, Criminal P. C. Action in all cases has been taken under S. 11 of the Frontier Crimes Regulation, 1901, and this deals with the method of trial of these offences, by setting up special tribunals. Item 1 of the Concurrent List relates to criminal law including all matters included in the Penal Code but excludes matters specifically dealt with in Lists 1 and 2. Item 3 relates to Criminal Procedure and item 4 to Civil Procedure and item 15 relates to the jurisdiction of powers of Courts relating to these matters. It appears to me that Act, 7 [VII] of

1944, in so far as it validates acts done in relation to offences under the Penal Code, security proceedings and the like which would have been valid if a notification on the lines of notification 1156 of 15-11-1887 had issued after the Regulation of 1901 came into force, comes within the items enumerated in the Concurrent Legislative List (List 21.) All the cases out of which this reference has arisen, are cases where the provisions of S. 11 of Regulation of 1901 have been used. This section deals with criminal references to the Council of Elders. It gives power to a Deputy Commissioner to withdraw criminal cases in certain circumstances from a Court out of the classes mentioned in S. 6, Criminal P. C. and refer the question of the guilt or innocence to a decision of the Council of Elders nominated by him, and after considering the findings of this body, pass orders under S. 12 in the case or cases referred. Item 1 relating to Criminal Law, item 2 relating to Criminal Procedure and item 15 dealing with jurisdiction and powers of all Courts with regard to matters included in items 1 and 2, appear to me to embrace all actions taken in relation to these cases under S. 11 of the Regulation. When S. 11 is brought into play, the trial of an issue is placed before one tribunal or other. That appears to involve solely a question of the jurisdiction of Courts. Where offences involved are those enumerated in the Penal Code or other offences not in the Exclusive, Federal or Provincial Lists, the subject-matter directly falls within item 1. Where proceedings for security are involved, or where the question is in what manner any such criminal issue shall be tried, the subject-matter falls equally clearly within item 2. This being the case, it appears to me that the Provincial Legislature is not debarred from legislating with regard to this subject, and both the Ordinance 1 of 1944 and Act 7 [VII] of 1944 are *intra vires*.

[10] Reference here should be made to the limits within which a law enacted by a Provincial Legislature regarding a matter falling within the Concurrent List is valid. Section 100 of the Constitution Act deals with the subject-matter of Federal and Provincial laws and enacts that when the subject-matter falls within the Concurrent Legislative List, both the Federal and the Provincial Legislatures have power to make law with respect thereto. Section 107 enacts that when there is an inconsistency between a Federal and a Provincial law, the Federal law whether passed before or after the Provincial law prevails and the Provincial law is void to the extent of the repugnancy. In Act 7 [VII] of 1944, which merely validates acts which would have been valid but for the existence

of a notification which the Local Government had omitted to issue, I can find nothing which is repugnant to an existing Indian law. The question of repugnancy or inconsistency may have arisen if the Provincial law had sought to make provision for certain matters which are within the Exclusive Federal List and are dealt with in the Frontier Crimes Regulation. For instance, under S. 21 of the Regulation a Deputy Commissioner is empowered in certain cases to debar any member of a tribe all access into British India or to prohibit any person living in British India from all intercourse or communication with a tribe or a member thereof. Under S. 29 the carrying of arms in certain places and in certain circumstances is made punishable with five years imprisonment. It is arguable whether these matters do not fall within the Federal Legislative List such as items 17, 19, 29 and 30 which deal with emigration and exclusion from India and the regulation of movements of certain persons with arms and with explosives. Except for these subjects, the Punjab Provincial Legislature is competent to enact a law in terms similar to the Frontier Crimes Regulation. If such a law could be enacted, it could be enacted with retrospective effect, with the result that even if the Punjab Act 7 [VII] of 1944, be regarded as having re-enacted certain provision of the Regulation, within its own powers of legislative action, the Punjab Legislature could make such a law with retrospective effect subject to the only limitation that where, if at all, it trespassed into the exclusive legislative field of the Central Legislature, the enactment would be void to that extent. As I have said already, what the Punjab Legislature has done, is not to alter, amend or repeal any provision of an existing Indian Law, such as the Frontier Crimes Regulation, but to remedy the omission of a notification applying this law to certain areas so as to make the Regulation applicable thereto.

[11] The next question is whether the Frontier Crimes Regulation ever applied to the present district of Mianwali. It will be recalled that the Regulation of 1887 applied to three named districts and could be made applicable to three others if the Local Government issued a notification to this effect. The Regulation of 1901 applied by its own operation to these six named districts, from the date of its promulgation. Thereafter by Notification No. 994 the Local Government ordered the transfer of the Attock Tehsil which formed part of Hazara District (one of the six districts to which the Regulation applied) to the Rawalpindi District and with effect from 1-11-1901 and this Tehsil was henceforth known as the Attock Tehsil of the Rawalpindi District. By Notification No. 995 the Local Government

constituted the new district of Mianwali with effect from 9-11-1901. This consisted of four Tehsils viz., Mianwali, Isa Khel Bhakkar and Leiah, the first two being taken out of the old Bannu District and the last two from the old Dera Ismail Khan district. The argument advanced is that the new District of Mianwali, though carved out of the six districts to which the Regulation applied, was no longer subject to that Regulation by the creation of a new district, and that the creation of this new district by notification amounted, in effect, to the exercise by the Local Government of the power under S. 1 (3) to exempt a portion of the six districts from the operation of the Ordinance. It was argued that the result necessarily was that the new district from the date of its creation was no longer subject to the provisions of the Frontier Crimes Regulation and any action taken or purported to have been taken under that Regulation was *ultra vires* and void *ab initio*. Such an act, it was contended, was not capable of being ratified. Further it was contended that if Mianwali had ceased to be subject to the Regulation, the only method whereby the Regulation could be made operative in that district was by means of action taken by an authority which could originally enact or promulgate it. The learned Advocate-General on the other hand contended that the Regulation was applicable by its own force to a certain tract of land covered by the six districts named therein, that the naming or fixing the boundaries of districts in that area was purely an administrative act done for administrative convenience, and neither the change of name of a district or the shifting of the boundaries of a district or the creation of a new administrative unit within the areas could render the Regulation inoperative in any portion of that area unless an exemption was specifically made to this effect by notification as contemplated in S. 1 (3) of the Regulation. This he submitted had admittedly not been done. The matter had been the subject of judicial decision and in this connection he invited our attention to 8 P. R. 1903 Cr.², to 25 P. R. 1915 Cr.³, to A. I. R. 1945 Lah. 99⁴ and to an unreported case Cr. Misc. No. 589 of 1944⁵ decided by Marten and Khosla JJ. on 23-3-1945. It is necessary to examine the reasons on which these decisions proceed and to examine whether they lay down a correct principle of law.

[12] In the first case reported as 8 P. R. 1903 Cr.² a similar contention was urged before Reid and Harries JJ. The Deputy Commissioner of Mianwali had taken action under the Regulation and it was contended that the Punjab Chief Court had the power to revise the order, as by the creation of the new district the Regulation had ceased to be operative and the order of the Deputy

Commissioner should be treated as that passed by an ordinary Magistrate and so subject to the revisional powers of the Court. The learned Judges were of the opinion that the Regulation had been made applicable to a defined area covered by the six districts named in the Regulation of 1901 as those districts then existed. They went on to say:

"It is patent that the separation of the North West Frontier Province does not affect the question, for if so it would have to be argued that the Regulation is not in force in the Dera Ghazi Khan District, nor could it well be contended that if, as actually happened, the Attock *tahsil* of the Rawalpindi District, in which district the Regulation has not been in force, were joined to the Hazara District the Regulation would be in force in that *tahsil*. The change in territorial sub-divisions does not appear to us to affect the operation of the Regulation. Thus we find in the preamble to the North-West Frontier Province Law and Justice Regulation, the provision in S. 3, Government of India Act of 1854 (17 and 18 Vic. c. 77) expressed that when any portion of territory is brought under the immediate control of the Governor-General in Council "no law or regulation in force at any such time as regards any such portion of territory shall be altered or repealed except by law or regulation made by the Governor-General in Council. The General Clauses Act (10 [X] 1897) Ss. 6 and 7 shows that repeal must be express and not only implied.

As to the term Deputy Commissioner it is to be observed that it is used in the Regulation without any collocation of the word 'district,' and in the absence of a definition in the General Clauses Act we understand the office to be one which might attach to any district subsequently formed; as was district Mianwali, out of parts of the area to which the Regulation applied when it came into operation, and it seems to follow that if the Regulation is in force in the Mianwali District the 'Deputy Commissioner' of the Regulation would so far as that District is concerned be the Deputy Commissioner of Mianwali.

With regard to the last contention that the power of exemption was exercised by the Local Government by the act of constituting the new district of Mianwali it seems only necessary to refer to the words of Notification No. 995. We there find that the sections of the Acts under which the Local Government was exercising powers are specified, but no reference is made to Regulation 3 [III] of 1901. The purpose of the Notification is thus expressly stated, and had there been any intention to exercise the power of exemption under the Regulation, we are of opinion that such intention would as indeed was necessary, have been signified by mention of S. 1 (3) of the Regulation.

We thus conclude that Regulation 3 [III] of 1901 is in force over the area covered by the six districts named in S. 1 3 of that Regulation as those districts were constituted on 18-9-1901. *Tahsil* Bhakkar was part of that area, and so the order complained of was one under the Regulation and not *ultra vires*."

[13] It appears to me that the assumption made in the passage quoted above that the Regulation was made applicable to the area covered by six named districts is not warranted by the language employed in the Regulation. The language must be given its ordinary meaning unless this construction leads to an absurdity. The language of S. 1 (3) is that the Regulation extends to the districts named and if the inten-

tion had been what has been assumed in the passage quoted, there was no difficulty in saying that the Regulation extended to the area now covered by the districts of so and so. The Legislature must have been aware that the districts might be varied in size for administrative purposes and there might be change of boundaries *inter se*. Such change would not render the Regulation inoperative, but if a portion of a district was cut out of one district mentioned in the Regulation and added on to a district not amongst those mentioned as happened in the case of the Attock Tehsil, it could not be urged that such portion cut off from one district and tacked on to another was a part of the six districts mentioned in the Regulation. The learned Judges noticed that Attock Tehsil of the Rawalpindi District was not subject to the Regulation and would not be subject thereto even if that Tehsil had been joined to the Hazara District. The learned Judges ignored or apparently were not made aware of the fact that Attock Tehsil was once part of the Hazara District and till the date of its separation from that district the Regulation applied to it. It was only when the Tehsil ceased to be part of that district and was added to the Rawalpindi District to which the Regulation did not extend, the Regulation ceased to apply to this Tehsil. If the assumption of the learned Judges had been correct that the Regulation applied to this particular tract of land, the Attock Tehsil would be still subject to the Regulation and, therefore, the dictum that "change of territorial sub-divisions does not appear to us to affect the operation of the Regulation" is contradicted by the very instance cited by the learned Judges. This consideration alone appears to me to vitiate the judgment which is based almost solely on the assumption that the Regulation was applied to a geographical unit. In my opinion, it was not the intention that the Regulation should attach to a geographical tract in the sense in which an easement or other similar liability attaches to a particular piece of land irrespective of the change of ownership.

[14] It further appears to me that the reasoning of the learned Judges is also not sound in repelling the argument that only the Deputy Commissioner of a named district would have jurisdiction to act. The Regulation says that the Deputy Commissioner can take action under ss. 5, 8, 11 etc., and submit cases to a Council of Elders in certain circumstances. It obviously means the Deputy Commissioner of the district concerned, for, if that were not so the Deputy Commissioner of Peshawar may take action in a case arising in Bannu or Dera Ismail Khan. If jurisdiction is so limited, and the assumption be correct that the Regulation extends to a geographical area irrespective of the name of the ad-

ministrative unit, the question arises which Deputy Commissioner would have jurisdiction to take action in the Mianwali District, whether the Deputy Commissioner of the Districts out of which Mianwali was carved or that of Mianwali which as a district once did not exist. The question cannot be answered in my opinion by saying that the term Deputy Commissioner "is used in the Regulation without any collocation of the word district." It is obvious that there cannot be conflicting jurisdiction and only one Deputy Commissioner can have jurisdiction in a given locality. The point came up for consideration before Rattigan J in 25 P. R. 1915 Cr.³ and the learned Judge sitting alone, felt bound to follow the decision of the Division Bench in 8 P. R. 1903 Cr.² He observed as follows:

"I appreciate the force of Mr. Govind Das's argument that if the Regulation be held to be still in force in the Leiah Tahsil, as if it had never been severed from the Dera Ismail Khan District, the logical inference is the Deputy Commissioner of that District and not the Deputy Commissioner of Muzaffargarh District had jurisdiction to refer this case to the *jirga*. This contention is, however, opposed to the ruling cited and I must, therefore, overrule it."

Had the learned Judge not felt himself so bound, it appears to me that the decision would have been the other way, and had it been so, it would, in my humble opinion, have been more consistent and logical. The learned Judges in 8 P. R. 1903 Cr.² said that change in territorial sub-divisions did not affect the operation of the Regulation and referred to the North-West Frontier Province Law and Justice Regulation in support of this view. When the new Province of the North-West Frontier was created the above-mentioned Regulation was promulgated. Before the Government of India Act, 1915, a new province was created by proclamation under S. 3, Government of India Act, 1854. The preamble of this Act of 1854 stated, *inter alia*, that it was expedient

"to provide for the Administration of the Governor-General of India in Council of such parts of the territories for the time being under the Government of the East India Company....."

and S. 3 of the Act provided that it would be lawful for the Governor-General in Council, with the sanction and approbation of the Court of Directors of the East India Company,

"by proclamation, duly published, to take under the immediate Authority and Management of the said Governor-General of India in Council, any part or parts of the territories for the time being in the possession or under the Government of the said Company and therefore to give all necessary Orders and Directions respecting the Administration of such part or parts of the said territories or otherwise to provide for the Administration thereof. Provided always that no Law or Regulation in force at any such time shall be altered or repealed except by Law or Regulation made by the Governor-General in Council.

[15] The argument is plausible, because when a new province is created, or an area is taken under the direct management and superintendence of the Governor-General, that area cannot be left without any laws till new enactments are made. Provision is always made for periods of transition. The analogy does not appear to me to be exact, because even though it may be true that in cases where a proclamation is made the old laws continue till repealed and replaced, where a law is once made applicable to a particular administrative unit as distinct from being made for a geographical area, the law ceases to operate when that administrative unit ceases to exist. If the law is made applicable to a geographical area, that would continue to operate with the change of nomenclature or of boundaries because by such change this area does not cease to exist. As I am of the opinion, for the reasons stated already that the law in question was made applicable to named districts and not to a geographical area covered by those districts, I am not able to accept as sound the analogy drawn from what occurs when a tract is taken under direct management and control by a proclamation under powers given by the Act of 1854.

[16] If the matter is pursued further, it is pertinent to consider what procedure was adopted when the new Province of Delhi was created. On 17-9-1912, a proclamation was issued in the exercise of powers under the Act of 1854 and the Tahsil of Delhi together with the thana of Mahrauli was constituted into a new province. This area was cut out of the old Province of the Punjab. The Delhi Laws Act, 13 (XIII) of 1912 was passed to provide for the application of the law in force in Delhi and for the extension of other enactments there to Section 2 of this Act laid down that the proclamation whereby this new province was constituted "shall not be deemed to have effected any change in the territorial application of any enactments even though such enactments had been expressed to apply to territories under any particular administration." I take this to mean that if an enactment was in force in an area including the new province of Delhi before the proclamation, the law or enactment shall continue to remain in force in Delhi province as constituted, after the proclamation. The language further indicates to my mind that no matter whether previous laws were made applicable to a tract of land as a geographical unit or to an administrative unit, the same laws shall continue to be in force subject to the rule of construction laid down in S. 3 and Schedule B. It was realized that the laws in so far as they had been enacted for an administrative unit would cease to be ap-

plicable after the change in the name and boundaries of the administrative unit and therefore, it was necessary to save their territorial application. Again when in 1915, 65 Revenue Estates out of the United Provinces of Agra and Oudh were added to the new Province of Delhi the question arose to what laws this newly added territory would be subject. If the United Provinces Laws operated in the newly added territory because it had been cut out of the United Provinces of Agra and Oudh it would not have been necessary to legislate on this matter. What we find, however, is that it was declared by the Delhi Laws Act (7 [VII] of 1915) that Punjab Acts would remain applicable to the area taken from the Punjab and the United Provinces Acts and some Central Acts like the Transfer of Property Act and the Easements Act which were in force in the United Provinces and not in the Punjab would remain in force in the 65 Revenue Estates taken out of the United Provinces and added to the Province of Delhi. If the laws automatically remained in force, there would seem to have been no necessity for this declaration. It may be noted here that under the Government of India Act, 1935, the creation of a new province and the alternation of the boundaries of a province is regulated by ss. 289 and 290. Section 289 enacted that in the matter of Sindh and Orissa, an Order in Council was to fix the date of the creation of these Provinces and such order was to define the boundaries of the Provinces and may contain provision for the laws which are to be in force in them.

[17] It appears to me that it is not really necessary to consider the analogies that arise from the change in position caused by the creation of a new province because there for the most part previous laws are applicable to tracts of land and not to administrative units. In the case of the Frontier Crimes Regulation, it appears clear from the scheme of the Regulation itself that it was intended to apply to six named administrative units and only officials attached to those units were given powers to act within their area of jurisdiction. When one or more units disappeared, the officials having jurisdiction therein ceased to exist and with them ceased to exist the Regulation itself. The last argument in 8 P. R. 1903 Cr.² that if power of exemption had been exercised in fact, a reference would have been made to S. 1 (3) of the Regulation in the notification constituting the new district is correct only to the limited extent that perhaps it was not specifically intended to exclude the operation of the Regulation from this district, but the point that in fact the action taken had the effect of excluding it does not appear to have been met. On the whole therefore, it appears to me that

the main basis of the decision in 8 P. R. 1903 Cr.² being the wrong assumption that the Regulation had been applied to a geographical area and not to named administrative units, the case has been wrongly decided.

[18] The next decision relied upon by the learned Advocate-General was that reported as 25 P. R. 1915 Cr.³ In dealing with the contention that the Regulation was not in force in the Leiah Tehsil which now forms part of the Muzaffargarh District the learned Judge observed that 8 P. R. 1903 Cr.² was authority for overruling the contention. It was, he said, a Division Bench ruling and as such binding on him. Regarding the other contention that the Deputy Commissioner of Muzaffargarh had no jurisdiction I have already quoted a passage from the judgment showing that he apparently differed from the reasoning in 8 P. R. 1903 Cr.² but felt constrained to follow it. If therefore, the 1903 case was wrongly decided, the decision in 1915 does not carry the matter further and cannot be supported. The third case referred to on the subject by the learned Advocate-General was A. I. R. 1945 Lah. 99⁴ decided by myself and Teja Singh J. The point was never directly before us and was not argued. The contention raised in the case was Notification No. 1156 should be read subject to exceptions mentioned in Notification No. 720 of 9-7-1867. This last notification was held to have been virtually cancelled by a still later Notification No. 749 of 7-9-1892 and that was the only basis of the decision on the point raised. A remark was made, however, in dealing with this matter to the following effect. "Admittedly Mianwali was carved out of these districts and what applied to these three districts would apply to Mianwali also." The remark I made was *obiter* and if it is construed to mean that whatever law applied to the districts out of which Mianwali was carved out necessarily applied to Mianwali also, the remark is incorrect.

[19] The last case referred to was the unreported decision by Marten and Khosla JJ. Cri. Misc. No. 589 of 1944.⁵ Marten J. who delivered judgment grounded his decision on the assumption on which the decision in 8 P. R. 1903 Cr.² rests, namely, that the regulation had been originally applied to a geographical area. He observed :

"The Frontier Crimes Regulation is a special enactment provided by the Legislature for dealing with special cases arising and made necessary by the customs and habits of people who belong to certain geographical areas. Statutes are meant to govern persons and classes of persons living in localities geographically definable. It does not appear to me to matter by what different names such definitions are made from time to time, so long as the actual areas remain unaltered. Therefore, in my view, as far as the Punjab is concerned the names "Dera Ismail Khan" and "Dera Ghazi

Khan" appearing in sub-s. 3 of S. 1 of the Regulation can now be read as "Mianwali."

In dealing with the contention that on this construction the Deputy Commissioner of Mianwali alone would not have jurisdiction the learned Judge further went on to say that as the names Dera Ismail Khan and Bannu are now to be read as Mianwali, word Deputy Commissioner refers only to the Deputy Commissioner of Mianwali. He observed, with reference to the remark by Rattigan J. in the passage already quoted "With the very greatest respect, I would differ from the opinion which that learned Judge seems to have expressed. My view is that the Regulation applies to a definite geographical locality irrespective of what it may from time to time be called."

[20] I have already tried to show that the reasoning of 8 P. R. 1903 Cr.² is not correct and this decision which repeats that reasoning does not require further comment and both decisions will stand or fall together. The net result is that in my view the Regulation was not expressed to apply and so did not in fact apply to a tract of land covered by the six named districts and therefore, when for any reason whatever any portion went out of the jurisdiction of these six named districts the Regulation ceased to apply. Therefore, as from the date of the creation of the new District of Mianwali the Regulation itself ceased to apply to it and any action taken under the Regulation was therefore void so far as that district was concerned. I would hold therefore, that neither the Punjab Act 7 (VII) of 1944 nor the Punjab Ordinance 1 (I) of 1944 is *ultra vires* the Punjab Legislature or the Governor of the Punjab in so far as the Federal Legislature has not exclusive jurisdiction to legislate. The cases out of which the present reference arises are within the competence of the Provincial Legislative Authority. But what the Legislature has done is to remedy the omission of a notification not to enact a law on the lines of the Regulation. The effect therefore is that in those districts in which the Regulation was in force by its own operation but in which the notification extending it to certain classes of persons had not been issued, then any action taken under the Regulation in those districts would be just as valid as if a notification on the lines of notification 1156 had in fact been issued: Where, however, a portion of some district or districts has ceased to remain within those six districts to which the Regulation applied, then the issue or the failure to issue of such a notification does not affect the position in the portion so cut out. The area now covered by the district of Mianwali, while it remains in this district by this name, cannot be said to be part of the six districts to which the Regulation ever applied or was meant or intended to be applicable. A notification on the lines of notification 1156 would not make the Regulation applicable to Mianwali which has gone out of the six named districts and is no longer part of them any more

than it would to the district of Lahore were it stated to be applicable to it as it never was part of those six named districts. The position would be otherwise if a tehsil or two of the present districts of Mianwali were to be detached from Mianwali and added to one or more of the six named districts. In that case from the date of such addition the Regulation would become applicable by virtue of such a notification.

[21] The analogies drawn from the separation of the Frontier Province appears to me to be false because on the very day on which the Proclamation constituting the Frontier Province was promulgated, viz 9-11-1901, the district of Mianwali was created: When three districts went to the newly constituted Province, it is true the laws in force in those three districts continued to remain in force after they became part of the new Province. This result was achieved not because the three districts were taken out of the Punjab but because those three districts even after their amalgamation in the Frontier Province remained as such under the same names without any loss of identity and therefore continued after separation to be subject to the laws to which they were subject immediately before the Proclamation. If it happened that a portion of one of these three districts was separated and added on to another district of the Frontier Province, the Frontier Crimes Regulation would cease to apply to that part. On the other hand, if a portion of one of these six districts whether in the Punjab or in the Frontier were to be taken out of one of these six districts and added on to another of these districts, there would be no change in the law by the change of boundaries or areas covered by such districts.

[22] The answer I propose to questions 1 and 2 which have been propounded is that the Ordinance and the Punjab Act are both *intra vires* with the limitation mentioned, viz., except to the extent that where, if at all, the exclusive sphere of the Federal Legislature is encroached upon, the legislation is void to the extent of the encroachment. The Ordinance and the Act as worded however do not validate the orders, proceedings and acts therein referred to. If the Regulation itself does not apply to a district, a notification bringing certain persons resident in that district within its operation, cannot have the effect of making the Regulation as such, in force in that district. When the defect of the omission to issue the notification is supplied, a new area outside the meaning and scope even though within the boundaries of the six named districts, does not thereby become subject to the provisions of the Regulation. In the absence of this, the ordinary law of procedure which the Regulation changed and modified would con-

tinue to have operation and effect and any Order which purported to have been passed would be deemed to have been passed under the ordinary law before it was modified and so subject to the revisional jurisdiction of the High Court.

[23] So far as question 3 is concerned I am of the opinion that under S 491, Criminal P. C., the High Court can entertain a petition at the instance of a complainant. The section says. The High Court may, whenever it thinks fit, direct (a) that a person within the limits of its appellate Criminal jurisdiction be brought up before the Court to be dealt with according to law, and (b) that a prisoner detained as aforesaid shall within such limits be removed from one custody to another for the purpose of trial. The language of the section places no limit in the class of person or persons who can move a High Court with relation to a person in custody and if the High Court on hearing the petition thinks fit to do so, may make an order that he be dealt with according to law. Such a petition at the instance of a complainant is therefore competent. It also appears to me that questions of bail should be dealt with as if the orders were passed by Courts subject to the revisional jurisdiction of this Court.

[24] **Mehr Chand Mahajan J.**—I agree.

[25] **Achhru Ram J.**—I agree.

[26] **Khosla J.**—I agree.

[27] **Abdul Rashid Ag. C. J.**—I have had the advantage of reading the judgment which my brother Ram Lall proposes to deliver. I agree with him in holding that the Punjab Ordinance No. 1 of 1944 and the Punjab Act 7 [VII] of 1944, are not *ultra vires* of the Governor of the Punjab and the Provincial Legislature respectively. I further agree with my learned brother that the Frontier Crimes Regulation, 1901, does not apply to the district of Mianwali. This district was carved out from the territory comprised in other districts on 9-11-1901, and the Frontier Crimes Regulation ceased to be applicable to the newly constituted district of Mianwali from that date. Punjab Act, 7 [VII] of 1944 came into force on 22-12-1944. A number of proceedings had been taken and acts done by the Provincial Government, by authorities subordinate to the Provincial Government or by Council of Elders in respect of crimes committed in the Mianwali district between 9-11-1901 and 22-12-1944. The question for consideration is whether the orders made, proceedings taken, and acts done by various authorities in the district of Mianwali purporting to act under the Frontier Crimes Regulation, in the belief that the Frontier Crimes Regulation applied to Mianwali district have been validated by the passing of Punjab Act, 7 [VII] of 1944. My learned brother is of the opinion that as the Frontier Crimes Regulation ceased to be applicable to the district of Mianwali from 9-11-1901,

the proceedings taken and acts done in the district of Mianwali between 9-11-1901 and 22-12-1944 cannot be said to have been validated by the passing of Act, 7 [VII] of 1944. On the other hand, I am of the opinion that the language of S. 2, Punjab Act, 7 [VII] of 1944, is sufficiently wide to validate the acts done by various authorities in the Mianwali district between 9-11-1901, and 22-12-1944. Section 2 of the Act, is divisible into two portions. The first portion runs as follows:

"All orders made, proceedings taken and acts done by the Provincial Government, by any authority subordinate to the Provincial Government, or by any person, which were made, taken or done, or which purported to be made, taken or done, in the exercise of the powers derived or *believed to be derived* from the provisions of the Frontier Crimes Regulation, 1901 (hereinafter referred to as the 'said Regulation'), by virtue of Punjab Government Notification No. 1156, dated 15-11-1887, or in execution of or in compliance with any orders made or sentences passed by the Provincial Government or by any authority subordinate to the Provincial Government in the exercise or purported exercise of powers as aforesaid, shall be deemed to be and always to have been, validly made, taken and done."

[28] The portion of S. 2 reproduced above validates all orders made, proceedings taken and acts done by any person in the belief that he was making the order or doing the acts by virtue of the powers vested in him by the provisions of the Frontier Crimes Regulation and by virtue of Punjab Government notification No. 1156, dated 15-11-1887. By this portion of the section, all these acts were validated in their entirety provided they were done in the belief that the Frontier Crimes Regulation empowered the doing of those acts. This portion of S. 2 of the Act, did not cure the defect which had crept into the law by the failure of the Provincial Government to issue a notification similar to Notification No. 1156, dated 15-11-1887. It merely validated the acts that had already been performed by various persons in the exercise of the powers derived or believed to be derived from the provisions of the Frontier Crimes Regulation, 1901. The second part of S. 2 of the Act, is in the following terms:

"And for the purposes of the said Regulation and of any other law for the time being in force, all such orders, proceedings and acts shall be as good and valid, as if the said notification had issued under the provisions of S. 1 of the said Regulation."

[29] This portion of the section cured the defect that had come in by the failure of the Provincial Government to issue a notification similar to Notification No. 1156, dated 15-11-1887, on the passing of the Frontier Crimes Regulation in 1901. In my opinion, therefore, the validating Act not only made the omission to issue a notification similar to Notification No. 1156 immaterial, but it also validated acts which had been done by the Provincial Government or by any authorities subordinate thereto in the belief that they were acting in exercise of the powers conferred

by the provisions of the Frontier Crimes Regulation, 1901. I would answer the three questions referred to the Full Bench as follows: 1. The Punjab Ordinance No. 1 of 1944 and Punjab Act 7 [VII] of 1944, are not *ultra vires*. 2. The Ordinance and the Act validate all orders made, proceedings taken and acts done up to 22-12-1944. They do not validate any orders made, proceedings taken and acts done after 22-12-1944. 3. A petition under S. 491, Criminal P. C. lies in a case such as Criminal Miscellaneous No. 577 of 1944.

Per Full Bench. — These cases will now be remitted to the Single Bench for final disposal at an early date.

N.S./D.H.

Order accordingly.

*** A. I. R. (35) 1948 Lahore 43 [C. N. 13.]**

MUNIR AND MARTEN JJ.

Lal Khan s/o Rehman and others—Convicts—Appellants v. Emperor.

Criminal Appeal No. 133 of 1947, Decided on 30-4-1947, from order of Sessions Judge, Ferozepore, D/- 21-1-1947.

* (a) Criminal P. C. (1898), S. 342 — Magistrate recording statement of accused — No warning required by S. 164 given—Final report under S. 173 not put in — Admissibility of statement as confession—Criminal P. C. (1898), Ss. 164, 173 and 190.

It is well settled that the report contemplated by S. 190 need not be a final report under S. 173 and that any report of facts which constitute an offence made by any police officer is sufficient to give the Magistrate jurisdiction to take cognizance of the offence and to commence the enquiry or trial. In such case, it is quite competent to the enquiring or trying Magistrate to proceed to record the statement of the accused person under S. 342 without giving any such warning as is required by S. 164. Hence a confession recorded by an enquiring Magistrate is not rendered inadmissible merely by reason of the fact that the final report under S. 173 has not been put in and the warning required by S. 164 has not been given to the confessing accused. The case is not governed by the principle that where the law requires a thing to be done in a particular way it can only be done in that way and in no other: 15 A. I. R. 1928 Lah. 724, *Dissent*. [Paras 7 and 8]

('46-Com.) Cr. P. C., S. 342, Notes 2 and 9.

(b) Evidence Act (1872), S. 25—Accused's statement taken down as first information report — Admissibility.

Where an accused person himself makes a statement which is taken down as a first information report, the statement is inadmissible against the accused as it amounts to a confession to a police officer. But there is no bar to using such a confession in favour of the accused. [Paras 3 and 11]

(c) Criminal P. C. (1898), S. 367—Appreciation of evidence — Relationship of accused with deceased, if affects value of his evidence.

The mere fact of a witness's relationship with the deceased is not a sufficient reason to discard his evidence in a murder trial. [Para 10]

('46-Com.) Cr. P. C., S. 367, N. 6.

(d) Criminal P. C. (1898), S. 367 (5)—Murder trial — Deceased seen with accused's female relative in jungle—Commutation of death sentence.

Though in a murder trial, the fact that the deceased was seen in the jungle sitting by a female relative of the accused before he was attacked may not amount to a grave and sudden provocation, it would be a sufficient justification to withhold the death sentence. [Para 11]

('46-Com.), Cr. P. C.—S. 364, N. 14.

Case referred:—

1. ('28) 15 A. I. R. 1928 Lah 724 : 110 I. C. 329, Sullah v. Emperor.

P. N. Kaul—for Appellants.

Mohd. Amin Khan and Madan Mohan for Advocate-General—for the Crown.

Munir J.—This is an appeal by Lal Khan, Boghi and Ramzan, who have been convicted by the learned Sessions Judge of Ferozepore for the murder of Rehana and sentenced to death.

[2] The central figure in the case is one Mt. Shado with whom each of the three appellants is connected in one way or another. Lal Khan is the son of a brother of Mt. Shado; Boghi is the nephew of Mt. Shado's husband Ghulam; and Ramzan was brought up by Mt. Shado from his infancy. Mt. Shado, though a married woman, had been carrying on an immoral liaison with Rehana deceased and this illicit intrigue is stated to be the motive for the murder of Rehana.

[3] Rehana was killed between 10 and 11 A. M. on 21-7-1946 near the field of one Shahamad Khan in the estate of village Thajrana. The occurrence is said to have been witnessed by Sadiq (P. W. 6) and Ahmad (P. W. 7). These two men went to the police station to lodge information when they found that all the three appellants had already reached the police station and were in the custody of the Station House Officer. According to the evidence of the Station House Officer, the appellants were produced before him at Fazilka at 3-30 P. M. by S. Sher Singh, Assistant Sub-Inspector. S. Sher Singh deposes that the three appellants came to him in the afternoon at his house and that he took them to the police station and handed them over to the Station House Officer, Ch. Inayat Ullah, Sub-Inspector. When the appellants were brought to the police station, one of them had a *chhavi*, the other an axe and the third a stick. Boghi, one of the appellants himself made a statement which was taken down as first information report in the case. That statement, however, is inadmissible against the appellants as it amounts to a confession to a police officer.

[4] The learned Sessions Judge was not impressed by the evidence of Sadiq (P. W. 6) but he relied on the evidence of the other eye-witness Ahmad (P. W. 7) and the confessions of the appellants recorded by the Committing Magistrate under S. 342, Criminal P. C., in the course of the enquiry. An objection to the admissibility of the confessions was taken before him on the autho-

rity in A. I. R. 1928 Lah. 724¹ but it was overruled on the ground that the facts of the case cited were distinguishable. Before us, the same objection has been repeated and after examining the legal position we have come to the conclusion that though the learned Sessions Judge was not right in distinguishing the present case from that in A. I. R. 1928 Lah. 724¹ the record of the confessions is admissible in evidence unless the confessions be held irrelevant under S. 24. Evidence Act, on the ground of their having been procured by improper inducement by the police.

[5] As already pointed out, the murder was committed before midday on 21st of July. Information with the police was lodged at 3-30 P. M. the same day. It appears that the police completed the investigation very quickly and on 23rd July submitted what is described as an incomplete *chalan* to the Ilaqa Magistrate. It was stated in the police report that though the investigation had not been finally completed, there was apprehension of the witnesses being got round by the accused persons and that therefore proceedings in the case be commenced at once. Upon this the Magistrate recorded the evidence of eight witnesses who were produced with the *chalan* when the accused persons asked the Magistrate to record their statements. Accordingly, the Magistrate examined the accused persons under S. 342, Criminal P. C., and each of the accused made a confession. The accused were not represented by counsel and none of the prosecution witnesses was cross-examined. There is nothing to show that the Magistrate gave any opportunity to the accused to engage counsel.

[6] Two days later, i. e., on 25th July, the accused submitted through counsel an application, alleging that they had been deceived by the police because it was represented to them that if they made confessions, they would get off with a nominal sentence. They, therefore, retracted the confessions and alleged that they knew nothing of the occurrence and that they were innocent. Five witnesses had remained unexamined when the statements of the accused were recorded. Of these four were subsequently given up by the Prosecuting Officer, and only one more witness was examined. The accused were again questioned by the Magistrate and they stated in reply that their statements were already on record and that, if necessary, they would make a statement in the Court of Session. When questioned at the trial, the accused again alleged that their confessions had been obtained by deception and that they knew nothing of the occurrence. Learned counsel for the appellants contends that the confessions made by the appellants before the Committing Magistrate were inadmissible because they were made while the police were

still investigating and were not recorded in the manner prescribed by S. 164, Criminal P. C. It may be mentioned that when the Magistrate commenced the enquiry on 23rd July, the case was still under investigation as the final report under S. 173, Criminal P. C., had not been put in. There is evidence that when the appellants were produced before the Magistrate on 23rd July, the officer in charge of the investigation knew that the appellants would confess. It can therefore be inferred that the incomplete chalan was put in on that day merely with a view to enabling the Magistrate to record the evidence of the prosecution witnesses and the statements of the appellants. It is thus impossible to distinguish this case from A. I. R. 1928 Lah. 724¹ in which a Division Bench of this Court held that where a confession is recorded by a Committing Magistrate under S. 342, Criminal P. C., while the case is still under investigation by the police, the confession is inadmissible unless it is recorded in accordance with the provisions of S. 164, Criminal P. C., namely, after explaining to the accused that he is not bound to make a confession and warning him that if he makes any confession it may be used as evidence against him. If the law is correctly laid down in A. I. R. 1928 Lah. 724,¹ there can be no manner of doubt that the confessions in the present case must be ruled out, because it is quite clear from the circumstances that the object of the police in presenting an incomplete chalan and producing the prosecution witnesses with the chalan was to have the statements of the appellants recorded under S. 342 of the Code. We are, however, unable to agree with the statement of the law in A. I. R. 1928 Lah. 724.¹

[7] Section 164, Criminal P. C., enables a Magistrate who is duly empowered under that section to record a confession made to him in the course of an investigation under Chap. 14 or at any time afterwards before the commencement of the enquiry or trial. An investigation under Chap. 14 is not concluded until a final report under S. 173 of the Code is submitted by the police and therefore under S. 164 of the Code the confession of a prisoner may be recorded at any time before such report is put in or at any time afterwards but before the enquiry or the trial has begun. The Code of Criminal Procedure clearly contemplates the possibility of a Magistrate who has taken cognizance of an offence commencing an enquiry or trial even though the case is still under investigation in the sense that the final report under S. 173 has not been put in. Under S. 170 of the Code, if upon an investigation under Chap. 14 it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground

to justify the forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report, and to try the accused or commit him for trial. Under S. 190 a Magistrate may take cognizance of an offence upon a report in writing of facts which constitute such offence made by any police officer. It is well settled that the report contemplated by S. 190 need not be a final report under S. 173 of the Code and that any report of facts which constitute an offence made by any police officer is sufficient to give the Magistrate jurisdiction to take cognizance of the offence and to commence the enquiry or trial. If, therefore, a report made by the investigating officer under S. 170 complies with the conditions of S. 190, sub-s. (1), cl. (b), namely, that it states the facts which constitute an offence, the Magistrate can take cognizance of the offence under S. 190 and proceed with the enquiry or trial. Thus the position is quite possible, and every one acquainted with the procedure of police investigation knows, that an enquiry or a trial might begin on a report made by the police under S. 170, even though the matter is still under investigation by the police and the final report under S. 173 has not been received. In such a case, it is, in our view, quite competent to the enquiring or trying Magistrate to proceed to record the statement of the accused person under S. 342, Criminal P. C., without giving any such warning as is required by S. 164, Criminal P. C.

[8] Before an enquiry or trial has commenced, an accused person may be produced before a Magistrate for the purpose of having his confession recorded under S. 164, Criminal P. C. If that course is adopted, it goes without saying that the conditions of that section must be complied with by the recording Magistrate and the confession recorded only if the accused person has been told that he is not under an obligation to confess and that if he confesses, the confession may be used in evidence against him. If, however, before the investigation concludes, cognizance of the offence has been taken, and the enquiring or trial Magistrate has reached the stage where he considers it to be necessary or expedient to record the statement of the accused under S. 342, Criminal P. C., there is nothing to prevent him from proceeding to record such statement and if he decides to do so he is not bound to give the warning which he would have been under an obligation to give if the accused had been produced before him for the purpose of having his confession recorded under S. 164 of the Code before the commencement of

the enquiry or trial. We are, therefore, of the view that a confession recorded by an enquiring Magistrate is not rendered inadmissible merely by reason of the fact that the final report under S. 173 of the Code has not been put in and the warning required by S. 164 of that Code has not been given to the confessing prisoner. The case is not governed by the principle that where the law requires a thing to be done in a particular way, it can only be done in that way and in no other, because *ex hypothesi* the enquiry under Chap. 18 of the Code having begun, the Magistrate acquires the jurisdiction to question the accused under S. 342 of the Code and to record whatever he may have to say, even though what he may say be a confession. Further, while a Magistrate acting under S. 164 knows that the accused is produced before him because he desires to make a confession, the Magistrate holding an enquiry under Chap. 18 and questioning him under S. 342 need have no such knowledge and cannot, anticipating a confession give the warning required by S. 164. This view conflicts with the decision in A. I. R. 1928 Lah. 724¹ but with the greatest deference to the eminent Judges who were parties to this decision, we consider that due regard was not paid by them to the scheme of the Code of Criminal Procedure and the words of S. 164 of that Code. This being our view of the legal position, we consider that the law as laid down in A. I. R. 1928 Lah. 724¹ has been stated somewhat too broadly and that the record of the statement of a prisoner made in the course of an enquiry properly commenced is not inadmissible in evidence merely because the statement amounts to a confession and was made at a time when the final report of investigation was still awaited. For these reasons, we hold that the record of the statements of the appellants in this case was admissible in evidence.

[9] This, however, does not mean that the confessions cannot be shown to be irrelevant under S. 24, Evidence Act. There is no direct proof of any inducement having been held out to the appellants by the police but the circumstances make it as clear as circumstances in similar cases can ever do, that the statements of the appellants must have been made under some inducement or promise held out to them by the police. The appellants were arrested at Fazilka on 21st July and were not produced before a Magistrate on the 22nd as required by S. 61, Criminal P. C. Contrary to S. 171, Criminal P. C. the prosecution witnesses were produced on 23rd July with the *chalan* which means that they must have been required to accompany a police officer, no bond having been taken from them to appear before the Magistrate on that day. Both

the officers who were associated with the investigation of this case, namely, the Station House Officer and his Assistant, attended the Court on that day, though the former first denied that he went to Court on that day and admitted his presence only when he was confronted with the record of his own statement made by the Magistrate on that day. He also admits that by 10 A. M. on that day he had known that the appellants would confess. The appellants themselves expressed their anxiety and impatience to be examined before the prosecution evidence was concluded and the statements they made were full-fledged confessions qualified only by the allegation that they had killed the deceased because he was a paramour of their relation Mt. Shado and used to humiliate them by curling his moustache and jeering at them when he passed by them. The matter was so arranged that the appellants should not be in a position to obtain any legal assistance because they were not produced on the day on which in the ordinary course of law they should have been produced and were produced on a day when nobody expected them to be produced and when they had no opportunity to engage counsel to advise or defend them. These facts are quite sufficient to make it appear to us that the statements of the appellants were made under the influence of some promise or inducement held out to them by the police. The inevitable result of this is that the confessions must be ruled out as irrelevant. We cannot too strongly condemn the unseemly haste with which the proceedings were conducted by the learned Committing Magistrate. He appears to have been merely a subservient functionary in the hands of the Prosecuting Sub-Inspector who conducted the prosecution and the investigating officer who was anxious to have the proceedings concluded as early as possible. The Magistrate did not give a moment's thought to the duty he owed to the accused persons who were to be tried for their lives and who were entitled not only to legal assistance but also to all facilities in obtaining such assistance.

[10] The confessions having been ruled out, we have to see whether the remaining evidence is sufficient for the appellants' conviction. As already stated, there are two eye-witnesses, one of whom Sadiq (P. W. 6) did not favourably impress the learned Sessions Judge. The next witness is Ahmad (P. W. 7) against whom nothing can be said except that he is remotely related to the deceased, one of his aunts being married to a cousin of the deceased. His field is near the field of Shahamad Khan where the murder was committed and as the murder was committed in broad daylight he must have seen it if he

was in his field. We have no reason to disbelieve the evidence of the police officers that this witness was one of the men who met the police party when after arresting the appellants they came out of the police station on their way to the scene of the crime. The other witness, Sadiq has been described by the learned Sessions Judge as a person who has little regard for truth but the only basis for this remark is the witness's statement at the trial that he was not present when the Committing Magistrate recorded the statements of the appellants. The record, however, shows that though he at first did say that the statements of the appellants were not recorded in his presence, in the very next sentence he did admit, though after some hesitation, that he was present in Court when their statements were recorded. He is related to the deceased but that is a circumstance common to him and Ahmad, and we do not think that the mere fact of a witness's relationship with the deceased is a sufficient reason to discard his evidence. Like Ahmad, this witness was one of the party that went to the police station to give information about the murder. In our opinion, the evidence of both these witnesses is true and furnishes a sufficient basis for the conviction of all the appellants. The most important circumstance, which corroborates the direct evidence in the case, is the fact that all the three appellants themselves appeared at the police station and surrendered their weapons to the Station House Officer. It is true that these weapons were not found to be stained with human blood, but from this fact we cannot infer that the story of the appellants' coming to the police station with their respective weapons is an invention. These weapons could have been washed while the appellants were on their way to the police station. For these reasons, we consider that all the three appellants have been proved guilty of the murder of Rehana.

[11] The question of sentence presents some difficulty. The two eye-witnesses merely saw the attack on the deceased and not what might have preceded it. We cannot use a confession made to a police officer against an accused person but there is no legal bar to our using such a confession in favour of the appellants. In convicting the appellants, we have not taken into consideration the confessional statement of Lal Khan, appellant, which was incorporated in the form of first information report of the cases. In that statement this appellant had stated that Rehana deceased was seen in the jungle sitting by Mt. Shado before he was attacked. The possibility of any such incident having taken place before the deceased was assaulted cannot be ruled out and though this fact, if true, may

not amount to grave and sudden provocation so as to reduce the offence from murder to culpable homicide, it would in our opinion be a sufficient justification to withhold the death sentence in this case. For these reasons, we refuse to interfere with the conviction of the appellants but reduce the sentence from death to transportation for life in the case of each appellant.

V.R.

*Sentence reduced.***A. I. R. (35) 1948 Lahore 47 [C. N. 14.]**

CORNEIUS AND FALSHAW JJ.

Nizam Din Roshan and others—Convicts—Appellants v Emperor.

Criminal Appeal No. 206 of 1946, Decided on 6-1-1947 from order of Addl. Sessions Judge, Lyallpur, D/- 25-1-1946.

Criminal P. C. (1898), S. 439 (2)—Enhancement of sentence—Fresh notice when necessary—Main and subsidiary charges—Conviction on main charge set aside—Enhancement of sentence on subsidiary charge.

Where a sentence appears to be inadequate notice regarding enhancement should be issued ordinarily when an appeal is admitted. But when a sentence of transportation for life had been imposed by the lower Court on the main charge and an inadequate sentence had been imposed as a matter of form on what seemed to have been treated as a minor charge and the conviction and the sentence of transportation for life on the main charge was set aside and it becomes necessary to impose an adequate sentence on the accused for his substantive offence, (the main charge was under S. 302 read with S. 34 Penal Code). *Held*, the High Court could call upon the counsel of the accused to show cause against the enhancement under S. 439 (2) at once without adjourning the appeal and issuing a fresh notice to the accused: 21 A. I. R. 1934 Bom. 198, *Dist.* and 21 A. I. R. 134 Cal. 105, *Rel. on.* [Para 3]

('46 Com.) Cr. P. C., S. 439 Note 45 Pt. 5.

[Courts advised to impose adequate sentence for each offence charged and not to proceed as if charges other than the main one were only of academic nature.]

Cases referred:—

1. ('34) 58 Bom. 392 : 21 A. I. R. 1934 Bom. 198 : 151 I. C. 865, *Pandurang v. Emperor.*
2. ('34) 61 Cal. 6 : 21 A. I. R. 1934 Cal. 105 : 147 I. C. 1124, *Khoda Bux v. Emperor.*

*Mohd Amin and Ali Ahmad Khan—*for Appellants.
Vir Sen Sauhney and E. H. Bannerjee for Advocate General—*for the Crown.*

Falshaw J.—In this case the appellants Nizam Din, Walia and Bakhsha have been convicted by the Additional Sessions Judge, Lyallpur, under Ss. 302, 307, and 342 read in each case with S 34 Penal Code, and sentenced to transportation for life, two years and six months rigorous imprisonment each, the sentences being concurrent. (After narrating the facts of the case and discussing the evidence his Lordship proceeded as follows:) Thus, taking all the circumstances into consideration, I am of the opinion that the learned Sessions Judge was right in concluding that the truth of the prosecution story was substantially established. It is, however, contend-

ed on behalf of the appellants that even so it is not established that it was the common intention of the accused to commit murder and that if they had a common intention it was only to carry off Mt. Fatima to the house of Nizam Din, each of the accused being responsible for his own actions after the fighting started. Even on behalf of the Crown it was conceded that in the case of Nizam Din who was only armed with a stick it was difficult to hold that he intended to murder anybody, and on the whole I am inclined to agree that each member of the party of the accused must be held liable for his own actions after the parties had entered the *ihata* of Nizam Din. I would accordingly hold that of the appellants only Bakhsha was rightly convicted under S. 302 and that the convictions of Walia and Nizam Din under S. 302 read with S. 34, Penal Code, must be set aside as also must the convictions of Bakhsha and Nizam Din under S. 307 read with S. 34, only Walia being rightly convicted under S. 307 for the injury he caused to Kamir P. W. Similarly, Nizam Din ought only to be convicted under S. 323, though all the accused were rightly convicted under S. 342 read with S. 34, Penal Code. Unfortunately, the learned Sessions Judge having convicted all the appellants under S. 302 read with S. 34 and sentenced them to transportation for life, apparently thought that a separate sentence under S. 307 read with S. 34 was a mere formality and accordingly only imposed a sentence of two years' rigorous imprisonment under this section, which is obviously a grossly inadequate sentence in the case of Walia whose offence under this section is distinguished from the offence of Bakhsha only by the fact that Kamir somehow managed to recover from his head injury, which at the time must have seemed just as likely to prove fatal as the injuries caused by Bakhsha to Daim and by Manna to Jaimal. Thus it is clear that when the sentence of transportation for life imposed on Walia under S. 302 read with S. 34, Penal Code, is set aside it becomes necessary to impose an adequate sentence on him for his substantive offence under S. 307, Penal Code, which technically, at any rate amounts to an enhancement in the sentence and therefore under S. 439 (2), Criminal P. C., can only be done after the accused has had an opportunity of being heard. The question which thus arises is whether it is necessary in the circumstances to issue a fresh notice to the accused to show cause against the enhancement or whether without adjourning the appeal we could call upon his learned counsel to show cause at once. There is no doubt that where sentence appears to be inadequate, notice regarding enhancement should be issued

ordinarily when an appeal is admitted as has been held in 58 Bom. 392¹ but the present case in which a sentence of transportation for life has been imposed by the lower Court on the main charge and an inadequate sentence has been imposed as a matter of form on what seems to have been treated as a minor charge can hardly be described as an ordinary case. Moreover, there is a case in which the view has been expressed that where accused persons appeal against their convictions, it may be open to the appellate Court, should it after hearing the appeal decide against the appellants, straightway to give to the accused persons the opportunity of being heard upon the question whether the sentence ought to be enhanced or not, by calling upon the appellants, in the person of their pleader or advocate, to show cause there and then, why their sentences should not be enhanced. This is a Division Bench decision of the Calcutta High Court reported as 61 Cal. 6². Since, however, in that case notice regarding enhancement had been issued to the appellants the view that the notice was not necessary is a mere *obiter dictum*. At the same time, I am in agreement with Costello J. and do not consider that it was necessary for us to do more in the circumstances than to hear what the learned counsel for the appellants had to say against the enhancement of the sentence of Walia under S. 307, Penal Code, which could not be much in view of the manifest inadequacy of the sentence of two years' rigorous imprisonment. At the same time, in order that such complications may not arise again I may observe that in future the learned Sessions Judge, when convicting accused persons under more than one section should not take the view that the question of sentences under charges, other than the main charge is merely an academic one and should see that adequate sentences are imposed in each case. I would accordingly maintain the convictions and sentences of all the appellants under S. 342 read with S. 34, Penal Code, and the conviction and sentence of Bakhsha under S. 302 but set aside the conviction and sentence of Bakhsha under S. 307 read with S. 34, Penal Code and Nizam Din under S. 302 and 307 read with S. 34, Penal Code. I would also maintain the conviction of Walia under S. 307, Penal Code, and sentence him to ten years' rigorous imprisonment and convict Nizam Din under S. 323, Penal Code, and sentence him to one year's rigorous imprisonment. The sentences in each case will be concurrent as before.

Cornelius J.—I agree.

D.H.

Order accordingly.

A. I. R. (35) 1948 Lahore 49 [C. N. 15.]

TEJA SINGH J.

Mohammad Bakhsh and others—Petitioners v. Emperor.

Criminal Revn. No. 1658 of 1946, Decided on 15-10-1946, from order of Magistrate, 2nd Class, D/-20-5-1946.

Criminal P. C. (1898), S. 133—Transfer of proceedings.

Where a Magistrate in his preliminary order directs a person to remove an alleged obstruction or to appear before him to show cause or contest the order and the person appears before the Magistrate and files a written statement, the Magistrate at that stage has no power to transfer the case to another Magistrate for disposal, and the final order passed by the transferee Magistrate would be without jurisdiction. [Para 6]

Annotation: ('46-Com) Criminal P. C. S. 133 Note 21 pt. 2.

Case referred:—

1. ('38) 25 A. I. R. 1938 Lah. 323 : 175 I. C. 517, Umrao Singh v. Kanwar Lal.

Roop Chand—for Petitioners.

Som Datt Bahri for Advocate-General—for the Crown.

FACTS.—This is a revision petition of Mohd. Bakhsh against the order of Lt. Gurbachan Singh, Magistrate 2nd Class, dated 20-5-46 confirming order under S. 133, Criminal P.C. whereby Mohd. Bakhsh was directed to demolish his wall which he had built across a street used as public path.

[2] The facts are that Khushi Mohd. son of Nizam Din, Arain of village Chaharke Police Station Kartarpur applied under S. 133, Criminal P. C. in the Court of R. S. L. Narsingh Das, Magistrate 1st Class, Jullundur, that a wall erected by Mohd. Bakhsh and his brothers with the help of a servant on a public street be removed as it caused obstruction to the people of the village who used that street. The petition was referred to the Naib Tahsildar Jullundur for a report after inspection of the spot. The Naib Tahsildar reported on 22-2-45 that a wall had actually been built on the public street. Upon this report the learned Magistrate issued notice to Mohd. Bakhsh in the following terms:

"Mohd. Bakhsh and others have erected a wall in the public street with the result that passers using the street have to go round along a longer route and that the street has been closed. The respondents should therefore either open up the street within 15 days or should appear in this Court and put in their objections in writing against the order."

[3] Mohd. Bakhsh and other respondents appeared in R.S.L. Narsingh Das's Court on 26-3-45 in response to the notice and filed a written statement denying public right to pass through that street and alleging that the wall had been built many years back and was not a new one. The case was then fixed for evidence which however could not be recorded on several hearings. The

case went to another Magistrate on 6-5-45, who succeeded R. S. L. Narsingh Das. Mr. Mahmud transferred this case to Lieut. Gurbachan Singh Magistrate 2nd Class on 19-3-46. The latter, after hearing objections and evidence, passed a final order on 20-5-46 confirming the original notice issued to the respondent.

[4] The petitioners' counsel urged among other grounds that Lieut. Gurbachan Singh who is a Magistrate of the 2nd Class has no jurisdiction to hear and pass final order. The only Magistrate empowered under S. 133, Criminal P. C., to take action against public nuisances of the kind mentioned there was a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class. At the end of sub-s. (1) it is provided that such Magistrate can also direct respondents in the body of the original order to appear before a Magistrate of the 2nd Class and move him to have the order set aside or modified. It is not clear from this provision whether only a report by the Magistrate 2nd Class is contemplated or whether he is empowered to finally dispose of proceedings. This question, however, is not relevant in the case because in the original order the Magistrate had made no direction that the respondents could appear before a Magistrate of the 2nd Class and move him to set aside the order. The direction was clear and it was that they should appear before the Magistrate issuing the order and file their objections. Subsequent transfer to a Magistrate 2nd Class which was evidently to hold enquiry, give a finding and pass the final order, was therefore without jurisdiction and illegal. In support of this view there is an authority, A. I. R. 1938 Lah. 323.¹

[5] It is recommended under S. 438, Criminal P. C. that Lieut. Gurbachan Singh's order dated 20-5-46, confirming R. S. L. Narsingh Das's original order be set aside and the case returned to R. S. L. Narsingh Das, Magistrate 1st Class, Jullundur, for disposal according to law.

[6] **Order.**—In this case the preliminary order under S. 133, Criminal P. C., was issued by Rai Sahib Narsing Das, a Magistrate of the 1st class, and in that order he definitely directed the other side to appear before his Court to show cause or contest the order. Later on, Rai Sahib Narsing Das's place was taken by Mr. Mahmud Ali, another Magistrate 1st class, who when the respondents appeared before him and after they had put in written statements transferred the case for disposal to Lt. Gurbachan Singh, who had only second class powers. The final order in the case was passed by Lt. Gurbachan Singh. I agree with the Additional District Magistrate that Mr. Mahmud Ali had no power to transfer the case at that stage to Lt. Gurbachan Singh and the final order passed by

him is without jurisdiction. Accordingly I accept the petition, set aside the order of Mr. Mahmud Ali transferring the case to Lt. Gurbachan Singh and the order of the latter, dated 20-5-1946, and remit the case to Rai Sahib Narsing Das, who, I understand, is still attached to the district for disposal according to law.

[7] The parties' counsel have been directed to cause their respective clients to appear in the Court of Rai Sahib Narsing Das on 4-11-1946.

G.N.

Petition accepted.

*** A. I. R. (35) 1948 Lahore 50 [C. N. 16.]**

ABDUL RASHID C. J. AND MAHAJAN J.

Tirath Singh and another—Plaintiffs—Petitioners v. Isher Singh—Defendant—Respondent.

Civil Revn. Nos. 865, 866 and 867 of 1945, Decided on 14-1-1947, referred by Din Mohammad J., D/-14-5-1946.

¶(a) Arbitration Act (1940), Ss. 39 and 41—Order passed on appeal under S. 39—Revision competent—Civil P. C. (1908), S. 115.

There is nothing in S. 39 or S. 41 which in any way takes away the powers that the High Court possesses of entertaining petitions for revision under S. 115, Civil P. C. The proceedings before an appellate Court under the Arbitration Act are judicial proceedings and the Judge exercising powers is a judicial officer. Hence a revision under S. 115, Civil P. C. against an order passed on appeal under S. 39, Arbitration Act is competent: 32 A. I. R. 1945 All. 146; 29 A. I. R. 1942 Lah. 267 and 29 A. I. R. 1942 Lah. 186, *Rel. on.* [Para 3]

(b) Arbitration Act (1940), S. 30—Misconduct of arbitrator—Refusal to hear evidence.

The arbitrator may give his reasons for shutting out a certain amount of evidence sought to be tendered by a certain party. It is not, however, open to the arbitrator to refuse to grant an opportunity to a party to produce evidence on the ground that there was no necessity to examine witnesses or hear counsel. By telling the parties that there was no necessity to examine witnesses or hear counsel the arbitrator is guilty of judicial misconduct. [Para 5]

Cases referred:—

1. ('45) I. L. R. (1945) All. 162 : 32 A. I. R. 1945 All. 146 : 222 I. C. 64, Charan Das v. Gursaran Das.
2. ('42) 29 A. I. R. 1942 Lah. 267 : I. L. R. (1943) Lah. 601 : 203 I. C. 395, Tropical Insurance Co., Ltd., New Delhi v. Supdt. of Insurance, Commerce Department.
3. ('42) 29 A. I. R. 1942 Lah. 186 : I. L. R. (1943) Lah. 677 : 201 I. C. 739, Abdul Aziz v. Punjab Government, Lahore.

Badri Das and Bhagat Singh—for Petitioners.

D. R. Sawhney—for Respondent.

Abdul Rashid C. J.—Civil Revisions Nos. 865, 866 and 867 are connected and can be conveniently disposed of by one judgment. One Ganesha Singh had four sons, namely, Tirath Singh, Karam Singh, Kesar Singh and Ishar Singh. On 29-10-1943 Tirath Singh and Karam Singh instituted a suit against Ishar Singh for dissolution of partnership and rendition of accounts in respect of a factory situate at Kankana Sahib. On 20th January and 10th March

1944 two suits were filed by Mohindar Singh and Gurcharan Singh against Tirath Singh, Kesar Singh and others for a declaration that certain alienations made by Kesar Singh in favour of his brother Tirath Singh were null and void as against them and for joint possession of the aforesaid properties as members of a joint Hindu family. On 17-3-1944, by agreement of the parties, all these suits were referred to the arbitration of S. B. S. Abnasha Singh. On 19-5-1944, the arbitrator gave his award. A number of objections were preferred against the award. The trial Court held that there was no force in any of the objections. The award was, therefore, made a rule of the Court. Against this decision Ishar Singh defendant preferred an appeal in the Court of the learned District Judge. The learned District Judge, after a consideration of the various objections preferred by Tirath Singh and Karam Singh, came to the conclusion that the award could not be accepted and no decree could be passed in accordance with its terms as the arbitrator had been guilty of judicial misconduct. All the three suits were remanded to the trial Court for decision in accordance with law. As the plaintiffs were dissatisfied with the decision of the learned District Judge, they preferred three petitions for revision to this Court. These petitions came up for hearing before Din Muhammad J. on 14-5-1946. A preliminary objection was raised by Mr. Sawhney on behalf of the respondents to the effect that no revision was competent in view of the provisions of the Arbitration Act of 1940. The learned Single Judge was of the opinion that the question raised by the preliminary objection was an important one and as there were no authorities dealing with the point it was desirable that this point should be decided by a Division Bench. He referred all the three cases to a larger Bench for decision.

[2] The principal argument of Mr. Sawhney was that the Arbitration Act, 1940, was a consolidating Act, that it was a complete Code in itself and that as no right of revision had been given to any party by express provision in this Act, the decision of the learned District Judge was not open to revision. The learned counsel contended that S. 39 gave a right of appeal to the parties in certain contingencies. The six clauses of sub-s (1) of S. 39 detailed the orders which could form the subject-matter of appeal. By means of sub-s (2) of S. 39 it was laid down that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council. It was maintained that this section was comprehensive and by necessary implication it barred the

right of preferring a petition for revision to this Court. Reference was also made by the learned counsel to S. 75, Provincial Insolvency Act and S. 48, Guardians and Wards Act. It was contended that it had been laid down in S. 75, Provincial Insolvency Act that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit. It was urged that a similar provision could be inserted in S. 39, Arbitration Act and that would have made it clear without any doubt that the orders of the appellate Court under S. 39 were subject to a petition for revision. In my opinion, this contention is wholly devoid of force. Section 75, Provincial Insolvency Act lays down that the orders made by the District Court on appeal shall be final. As the orders were made final and as it was intended that the High Court should have the power of revision in respect of such orders the proviso to S. 75 (1) became necessary. The word 'final' is not used in S. 39, Arbitration Act and it was, therefore, unnecessary to add a proviso to this section. The same argument applies in the case of the Guardians and Wards Act.

[3] Section 41, Arbitration Act lays down that the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court, and to all appeals, under the Act. There is nothing in Section 39 or S. 41, Arbitration Act which in any way takes away the powers that this Court possesses of entertaining petitions for revision under S. 115, Civil P. C. The proceedings before an appellate Court under the Arbitration Act are undoubtedly judicial proceedings and the Judge exercising powers is a judicial officer. In these circumstances, there must be some express provision in the Arbitration Act taking away the powers of the High Court under S. 115, Civil P. C., before it can be held that no petition for revision is competent in the present case. Reference may be made in this connection to the case in I. L. R. (1945) ALL. 162¹ where it was held that there is nothing in S. 39 or S. 41, Arbitration Act to deprive the High Court of the powers conferred on it by S. 115, Civil P. C. In A. I. R. 1942 Lah. 267² it was observed that it may be necessary to make special provisions in an Act for appeals from orders in regard to which the Civil Procedure Code itself makes no provision but S. 141, Civil P. C., is sufficient to bring S. 115, Civil P. C., into operation and to allow revision if the matter itself can be regarded as a case decided by a Court of civil jurisdiction subordinate to the High Court. This ruling relates to a case under S. 33, Insurance Act. As the orders of the

District Judge under S. 33 were judicial orders it was held that the High Court had power of entertaining a petition for revision against such orders. To the same effect is A. I. R. 1942 Lah. 186.³ I have, therefore, no hesitation in holding that the orders of the learned District Judge in this case were subject to revision by this Court under S. 115, Civil P. C.

[4] The next question for consideration is whether the learned District Judge, in not accepting the award has acted without jurisdiction or has committed material irregularity in the exercise of his jurisdiction. The main argument addressed by the learned counsel for the petitioners was that the learned District Judge had mis-stated the facts of the case and had erred in basing his decision on such mis-statements. This contention cannot be acceded to. The learned District Judge had, after a consideration of all the circumstances of the case, come to the conclusion that it was the duty of the arbitrator to hear parties in the presence of each other and that he had been guilty of judicial misconduct in hearing the parties separately. After coming to this finding the learned District Judge fortified his conclusion by stating that Tirath Singh defendant had only made a half-hearted denial in respect of an allegation made by the other party. This observation is not sufficiently borne out by the record. It cannot, however, be held that this observation forms the basis of the decision of the learned District Judge. This was merely an additional reason to fortify the conclusion at which the learned District Judge had already arrived.

[5] The learned District Judge has held that the arbitrator had not allowed reasonable opportunity to one of the parties to produce evidence. The learned counsel contended that it was open to the arbitrator to say that evidence was unnecessary and that he was not prepared to give a party an opportunity to produce evidence. In my opinion, this contention is unsound. The arbitrator may give his reasons for shutting out a certain amount of evidence sought to be tendered by a certain party. It is not, however, open to the arbitrator to refuse to grant an opportunity to a party to produce evidence on the ground that there was no necessity to examine witnesses or hear counsel. The learned District Judge was justified in holding that by telling the parties that there was no necessity to examine witnesses or hear counsel the arbitrator was guilty of judicial misconduct. In any case, the decision of the learned District Judge on this point, even if erroneous, would merely amount to an error in law. It would not amount to a material irregularity in the exercise of jurisdiction.

[6] For the reasons given above, I see no ground for interference on the revision side in these petitions for revision. I would, therefore, dismiss them with costs.

Mahajan J.—I agree.

D.S.

Petitions dismissed.

A. I. R. (35) 1948 Lahore 52 [C. N. 17.]

ABDUL RASHID C. J. AND MAHAJAN J.

Mukand Lal and another — Judgment-debtor — Appellants v. Tara Chand and others Decree-holders — Respondents.

Letters Patent Appeal No. 53 of 1945, Decided on 6-1-1947, from judgment of Achhru Ram J. in Ex. S. A. No. 137 of 1944, D/-16-2 1945.

(a) Punjab Debtors' Protection Act (2 [II] of 1936), S. 9—Applicability —Joint Hindu family.

The section is inapplicable to the case of a joint Hindu family because in a joint Hindu family there is no succession. The property passes by survivorship. The surviving coparceners have already an interest in the joint family property and they are not the subsequent holders of the property: Ex. F. A. No. 198 of 1944, *Rel. on.*

[Para 4]

(b) Hindu Law—Joint family property—Property acquired by ancestors —Nature of.

No doubt there is no presumption that a joint Hindu family possesses joint family property but where it is proved that the property was acquired by the ancestors and there is nucleus of joint family property in the hands of the descendant, the presumption is that the whole of the property in his hands is joint family property unless the contrary is established. [Para 7]

Case referred:—

1. ('28) 9 Lah. 110 : 15 A. I. R. 1928 Lah. 212; 103 I. C. 170, Jugal Das v. Mt. Jasodan Bai.

Roop Chand—for Appellants.

Amar Nath Grover—for Respondents.

Mahajan J. — The respondents obtained a money decree against the estate of one Malik Amir Chand, a legal practitioner of Jhang in the hands of his sons L. Mukand Lal and L. Harbans Lal, one of whom is a practising lawyer. This decree was obtained as early as 24-2-1931, Malik Amir Chand having died in the year 1929. An application for execution of the decree was presented on 23-3-1933. The judgment-debtors raised a number of objections to this application and these remained pending till June 1936 when Act (2 [II] of 1936) (the Punjab Debtors' Protection Act) came into force. The judgment-debtors then thought of taking advantage of S. 9 of the new Act and on 13-8-1936 they presented an objection application in which it was alleged that they were governed by custom and that the property attached being ancestral it could not be seized in execution of the respondents' decree. The property attached consisted of lands, houses and certain sites. This objection was decided by the Senior Subordinate Judge in favour of the judgment-debtors. It was held that they were governed by custom and that the

property excepting chak kachha land, houses and sites was ancestral. As regards chak kachha land, the houses and the sites the attachment was allowed to continue, while as regards the ancestral property the attachment was released. Both parties appealed to the Additional District Judge, Jhang. The learned District Judge dismissed the decree-holder's appeal and maintained the finding of the trial Judge that the judgment-debtors were governed by custom. He further held that the land even in chak kachha was ancestral and should be released from attachment. The attachment in respect of the houses and the sites was, however, held valid.

[2] It may be pointed out that during the course of this litigation the decree-holders also attached certain agricultural land belonging to the estate of Malik Amir Chand in village Lak Badhar. Objections similar to those that had been raised regarding the rest of the land attached were raised in respect of this land as well. The trial Judge held that the land was ancestral and that the family was governed by custom. He therefore released the land from attachment and allowed the objection. The learned Additional District Judge maintained the decision of the trial Judge in respect of this piece of property as well. As a result of these two separate proceedings, two execution second appeals were preferred to this Court in the two respective cases by the parties dissatisfied with the decision. These appeals were heard by my brother Achhru Ram. On the question of custom the learned Single Judge was inclined to the view that the family of the judgment-debtors was not really governed by custom and that they had not abandoned the Hindu law which it must be presumed they followed, being Arora residents of the town of Jhang. In view, however, of a Division Bench judgment of this Court reported in 9 Lah. 110,¹ holding that the Aroras residing in Jhang, are governed by custom and in view of another decision of a learned Single Judge which had been affirmed by the Letters Patent Bench to the effect that the Khattris of Jhang were governed by custom, Achhru Ram J. did not finally give his opinion on the question of custom, though he said that he was personally inclined to the view that it has not been proved that the judgment-debtors were governed by custom in any matter relating to succession. He, however, allowed the appeal preferred by the decree-holders on the ground that the property in dispute had devolved on the judgment-debtors not by reason of the operation of any rule of custom but by survivorship and in that situation S. 9, Debtors' Protection Act (2 [II] of 1936) on which the objection of the judgment-debtors was grounded had no applica-

tion whatsoever to the case. The orders of the executing Court were set aside in both the cases and it was directed to proceed with the execution for the realisation of the decretal amount out of the properties attached in accordance with law. The parties were left to bear their own costs throughout. Against the decision of the learned Single Judge these two appeals under Cl. 10, Letters Patent (L. P. A. No. 53 of 1945 and L. P. A. No. 54 of 1945) have been preferred.

[3] It seems to me that these appeals can be shortly disposed of as it is unnecessary to go into the question which has been discussed at great length by the learned Single Judge whether the Aroras of Jhang town are governed by custom or by Hindu law. Section 9, Punjab Debtors' Protection Act is in these terms:

"When custom is the rule of decision in regard to succession to immovable property then, notwithstanding any custom to the contrary, ancestral immovable property in the hands of a subsequent holder shall not be liable in the execution of a decree or order of a Court relating to a debt incurred by any of his predecessors-in-interest."

[4] In order to get the benefit of this section it is essential to establish two things (1) that the custom is the rule of decision in regard to succession to immovable property and (2) that the objector is the subsequent holder of the ancestral property. The section is obviously inapplicable to the case of a joint family because in a joint Hindu family there is no succession. The property passes by survivorship and not by succession. The surviving coparceners have already an interest in the joint family property and they are not the subsequent holders of the property. This matter was considered by my brother Sir Abdur Rahman in Exn. First Appeal No. 198 of 1944 and the following observations made by him may appropriately be cited here.

"This led Beni Parshad's sons to raise an objection under S. 9, Punjab Debtors' Protection Act (Punjab Act 2 [II] of 1936) on the ground that the lands were ancestral and as they were governed by custom the lands in their hands were not liable to attachment and sale. . . .

It was admitted before the Subordinate Judge by Madhori Saran in his evidence as D. H. W. 2 that he along with his brothers and other members of the family formed a joint Hindu family even at the time when he was making the statement, and this statement was not controverted by the other objectors respondents who did not even care to appear in the witness-box. . . . And if they were members of a joint Hindu family, I do not understand how custom could possibly be regarded as a rule of decision in regard to succession to immovable property. As members of a joint Hindu family the property would pass on a member's death by survivorship and there is no question of succession in regard to that property. It appears that the Subordinate Judge failed to appreciate the importance of the statement made by Madhori Saran before him and to understand the purport of S. 9, Punjab Debtors' Protection Act. In matters where parties are members of a

joint Hindu family and thus governed presumably by Hindu law, S. 9 can never come into play."

I express my respectful concurrence with these observations.

[5] In the present case the learned Single Judge regarding the estate of Malik Amir Chand said as follows:

"When I asked Mr. Sawan Mal, the learned counsel for the respondents, to address me on the question of the interpretation to be placed on S. 9 and the implications of land devolving by survivorship in a joint family, it was not contended by him that the Jhang Aroras or the judgment-debtors' family had abandoned the institution of the joint Hindu family with its incidents as to survivorship etc., nor was it urged that the deceased Malik Amir Chand and his sons did not form a joint Hindu family and the property was not joint family property. He *only* disputed the interpretation that I was inclined to place on S. 9 and *inter alia* urged that if this interpretation were to be accepted it might exclude a large number of Hindus from the benefit of S. 9."

[6] From these observations, it is quite clear that it was conceded on behalf of the judgment-debtors that there had been no succession to Malik Amir Chand's property, on the other hand it had devolved on the two sons of Malik Amir Chand by survivorship. It was also conceded that the property in dispute was a joint Hindu family property. In view of this admission it is quite obvious that the provision of S. 9 could not be taken advantage of by the judgment-debtors. Mr. Rup Chand for the appellants, who was also the counsel of the judgment-debtors, when the case was heard by the learned Single Judge and was admittedly present in Court when Diwan Sawan Mal made that statement, now disputes the fact that the property of Malik Amir Chand had devolved on his two sons by the rule of survivorship. It was conceded by the learned counsel that L. Mukand Lal, judgment-debtor, who is a practising lawyer in Jhang, was present at the time when Diwan Sawan Mal made this statement and that Mr. Rup Chand himself was there, yet the statement of counsel was not contradicted and it was not contended before the learned Single Judge that he was making an erroneous statement. In the grounds of appeal under Cl. 10, Letters Patent it is not expressly stated that a wrong admission was made by Diwan Sawan Mal before the learned Single Judge. In these circumstances, it is not open to the learned counsel to urge that the statement made by the counsel was erroneous.

[7] Mr. Rup Chand urged that this was a new point which should not have been entertained by the learned Single Judge in second appeal and that as the parties had never been in issue on this point his clients were taken by surprise and under some error caused by the surprise this admission was made. This argument is totally

void of force. It is not possible to hold that three counsel appearing in a case would make an admission which was wholly incorrect. It must be presumed that Malik Amir Chand and his sons formed a joint Hindu family unless the presumption was rebutted. No evidence was led to rebut that presumption. The statement made by counsel was in accordance with this presumption. Of course there is no presumption that a joint Hindu family possesses joint family property. But in the present case it is proved that the property was acquired by the ancestors of Malik Amir Chand as early as 1870 and there was nucleus of joint family property in the hands of Malik Amir Chand. The presumption, therefore, was that the whole of the property in his hands was joint family property unless the contrary was established. It seems to me, therefore, that the admissions made by the counsel were quite consistent with the circumstances of this case and it cannot be held that they were erroneous. Mr. Rup Chand urges that there are no true joint families in this province, in the proper Mitakshara sense. This contention is based on a decision of the Punjab Chief Court in which the question was whether the property acquired by the sons could be seized in execution of a decree obtained against the father. The observations made in that case, however, have never been interpreted to mean that the rule of survivorship does not apply to joint families in this province. The result, therefore, is that the property attached having been taken by the judgment-debtors on the rule of survivorship they are not entitled to the benefit of S. 9, Punjab Debtors' Protection Act which only applies when the property is taken by a rule of succession under custom by a subsequent holder. It is unnecessary in view of this decision to deal with the main question whether the Aroras of the Jhang District are governed by custom or whether they have abandoned their personal law in matters of succession.

[8] For the reasons given above, I would dismiss both these appeals with costs.

Abdul Rashid C. J.—I agree.

N.S.D.

Appeals dismissed.

A. I. R. (35) 1948 Lahore 54 [C. N. 18.]

ACHHRU RAM J.

Mahashaya Krishna — Plaintiff—Appellant v. Mt. Maya Devi and others — Defendants — Respondents.

First Appeal No. 149 of 1946, Decided on 20-3-1947, from order of First Addl. Dist. Judge, Lahore, D/- 28-6-1946.

Succession Act (1925), Ss. 223 and 236 — Regis-

tered society—Arya Pritinidhi Sabha—Probate or letters of administration cannot be granted to.

Neither probate nor letters of administration can be granted to any association of individuals unless it is a company satisfying the conditions prescribed by rules made by the Provincial Government. An association of individuals does not cease to be an association by the mere fact of its being registered as a registered society under Act 21 [XXI] of 1860 and the registration of the society does not exempt the society from the operation of Ss. 223 and 236, Succession Act. The Arya Pritinidhi Sabha, Punjab, though a registered society was only an association of individuals and not a company and hence was not entitled to probate or letters of administration. [Para 3]

Narindar Nath — for Appellant.

Anand Mohan Suri — for Respondents.

Judgment.—This is an appeal from the order of the learned Additional District Judge of Lahore dismissing the application of Mahasha Krishna, Secretary, Arya Pritinidhi Sabha, Gurudutta Bhawan, Lahore, for probate, or in the alternative for letters of administration with the will annexed, of the will of one Lala Sant Ram Banprasthi son of Lala Ram Chandar deceased.

[2] Lala Sant Ram whose estate is the subject-matter of the present controversy died at Lahore on 1-6-1944. On 29-5-1944, he is alleged to have executed a will under which the Arya Pritinidhi Sabha, Gurudutta Bhawan, Lahore, was to be the executor and also the residuary legatee of his estate out of which a residential house was to remain in the occupation of his mother-in-law Mt. Shiv Devi during her lifetime and she was also to be paid maintenance at the rate of Rs. 7 *per mensem* while she was alive, and the entire residue, after her death, was to be spent by the Arya Pritinidhi Sabha in raising a suitable memorial to the testator and his wife. On 31-8-1945, Mahasha Krishna the Secretary of the Arya Pritinidhi Sabha, Punjab, Lahore, made a petition for the grant of probate or, in the alternative, of letters of administration with the will annexed. This petition was resisted by one Bal Raj, a nephew of the deceased on a number of pleas on which the following issues were framed by the learned trial Judge :

(1) Whether Sant Ram Banprasthi validly and duly executed the will in dispute while he was in perfect senses and disposing mind ?

(2) Whether the will was executed under undue influence and what is its effect ?

(3) Whether the deceased formed a joint Hindu family with Bal Raj respondent and the assets and the funds in dispute are joint family property ?

(4) Whether the present petition should be stayed under S. 10, Civil P. C., for the reason that the respondent had previously instituted a suit with respect to the will in dispute ?

The first two issues were decided in favour of the petitioner and it was held that Sant Ram

deceased did duly and validly execute the will in dispute while he was in possession of a sound disposing mind and that no undue influence was brought to bear upon him to secure its execution. Issue 4 was decided against the respondent. The learned District Judge being, however, of the view that the Arya Pritinidhi Sabha being an association of individuals within the meaning of Ss. 223 and 236, Succession Act, neither probate nor letters of administration could be granted to it, did not consider it necessary to give any decision on issue 3, and dismissed the petition on the ground of the incompetency of the Arya Pritinidhi Sabha to apply for probate or letters of administration. He left the parties to bear their own costs. Mahasha Krishna, Secretary of the Sabha has come up in appeal to this Court.

[3] Section 223, Succession Act, runs as follows:

"223. Probate cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the Provincial Government in this behalf."

Section 236 runs as follows :

"236. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the Provincial Government in this behalf."

There can be no doubt that according to the provisions of these two sections neither probate nor letters of administration can be granted to any association of individuals unless it is a company satisfying the conditions prescribed by rules to be made by the Provincial Government. It is not disputed that the Arya Pritinidhi Sabha, Punjab, is not a company within the meaning of these two sections. It was contended by the learned counsel for the appellant that the Sabha was not an association of individuals because it was a registered society governed by the provisions of Act 21 [XXI] of 1860. This contention of the learned counsel is wholly devoid of force. A society registered under the provisions of Act 21 [XXI] of 1860 does not cease to be an association of individuals by reason of such registration. Registration under the aforesaid Act only confers on it certain privileges which are not enjoyed by other associations of individuals. For example, such a society may sue or be sued in the name of the president, chairman or principal secretary or trustees as may be determined by the rules and regulations of the society: *vide* S. 6 of the Act. Any other association of individuals cannot sue or be sued in the name of its president or secretary unless it is otherwise held to be a corporation within the meaning of O. 29 and all the members of such association shall

have to join or be joined in any suit instituted by or against such an association. Similarly, some other privileges are given to a registered society by the express provisions of the Act. It is not, however, provided anywhere in that Act that the registration of a society under that Act would exempt the society from the operation of Ss. 223 and 236, Succession Act, and would entitle it, notwithstanding those provisions, to the grant of a probate or letters of administration.

[4] The learned counsel for the appellant laid stress on the hardship involved to societies like the Arya Pritinidhi Sabha, Punjab, which depend on public charity for their maintenance and for the maintenance of works of general public utility undertaken by them in case they are denied the right to the grant of a probate or letters of administration in respect of estates left to them for being utilised in furtherance of their philanthropic activities. I, however, am unable to see that the provisions contained in the aforesaid two sections involve any particular hardship to such societies, because they can always move the Administrator General to apply for letters of administration on the payment of his usual fees. In this Province they can also take necessary action to recover the estate without getting a probate or letters of administration.

[5] At the end of his arguments, the learned counsel for the appellant requested me to treat the present application as an application for the grant of a succession certificate. I, however, do not consider it to be either fair or proper to do so. It is open to the appellant if he is so advised to make a fresh application for the grant of succession certificate.

[6] It was also urged by the learned counsel for the appellant that Ss. 223 and 236 were no bar to the grant of letters of administration to Mahasha Krishna in his individual capacity. Apart from the consideration that the application has not been made by him in such capacity, no letters of administration can be granted to him in his individual capacity because he is neither the universal nor the residuary legatee under the will and accordingly has no right to apply for letters of administration.

[7] For the reasons given above, the appeal fails and is dismissed. In the circumstances, however, I leave the parties to bear their own costs. The duty paid by Mahasha Krishna shall be refunded to him.

G.B.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 56 [C. N. 19.]

KHOSLA J.

Bhola Nath Aggarwal and another—Plaintiffs—Appellants v. The Empire of India Life Assurance Co., Ltd.—Defendant—Respondent.

First Appeal No. 136 of 1946, Decided on 24-2-1947, from order of Commercial Sub-Judge 1st class, Lahore, D/- 11-4-1946.

(a) Civil P. C. (1908), S. 20, Expl. II — Branch office.

A corporation can be said to carry on business at the place where it has a branch office only in respect of a cause of action which arises wholly or in part at such place. If no part of the cause of action accrues at the place of the branch office, the mere fact of the corporation having a branch office at the place will not give the Court jurisdiction : *Case law reviewed.* [Para 16]

Annotation:—('46-Com.) C. P. C., S. 20, N. 31, pt. 3.

(b) Civil P. C. (1908), S. 20, Expl. II—Insurance Company—Suit for refund of premia and damages for cancellation of policy—Forum.

An insurance company had its head office at Bombay and a branch office at Lahore. A resident of Jullundur filled in the proposal forms at Jullundur and sent them to the branch office at Lahore. The Lahore branch office merely acted as a post office and had no authority to accept the proposal without sanction of the head office or to pass proper receipts for premia paid though they were received and credited to the company's accounts by the Lahore office. The acceptance of the proposal and cancellation of the policy and refusal to pay dues all took place at Bombay. A suit for refund of premia paid and for damages for wrongful cancellation was filed at Lahore: [Para 21]

Held, that the Lahore Court had no jurisdiction.

Annotation ('46-Com.) C. P. C., S. 20, N. 31.

Cases referred:—

1. ('18) 5 A. I. R. 1918 Pat. 126 : 4 Pat. L. J. 141 : 48 I. C. 943, Bank of Bengal v. Sarat Chandra Mitra.
2. ('18) 98 P. R. 1918 : 5 A. I. R. 1918 Lah. 320 : 45 I. C. 900, Punjab Mutual Hindu Family Relief Fund, Lahore v. Sardari Mal.
3. ('33) 14 Lah. 42 : 20 A. I. R. 1933 Lah. 11 : 140 I. C. 473, Kanshi Ram v. Dule Rai & Co.
4. ('43) I. L. R. (1943) 1 Cal. 564 : 30 A. I. R. 1943 Cal. 199 ; 207 I. C. 68, Peoples Insurance Co., Ltd. v. Benoy Bhusan Bhowmik.
5. ('44) 31 A. I. R. 1944 Cal. 1 : I. L. R. (1944) 1 Cal. 101 : 211 I. C. 450, Brinda Rani Devi v. Co-operative Assurance Co.
6. ('29) 16 A. I. R. 1929 Mad. 347 : 121 I. C. 155, John J. D. v. Oriental Government Security Life Assurance Co., Ltd.
7. ('33) 20 A. I. R. 1933 Mad. 764 : 145 I. C. 998, National Insurance Co., Ltd., Calcutta v. Seethammal.
8. ('37) 167 I. C. 669 : 24 A. I. R. 1937 Sind 17, Hasi v. Industrial & Prudential Assurance Co.

Som Datta Bahri—for Appellants.*Norman Edmunds and M. D. Jain*

—for Respondent.

Judgment. — 'The only point for decision in this appeal is whether the Lahore Courts have jurisdiction to entertain the appellants' plaint. The lower Court decided this point against the appellants and they have appealed to this Court.

[2] The relevant facts are that the plaintiffs who are residents of Jullunder City brought a suit for the recovery of a sum of money against

the defendants who are the Empire of India Life Assurance Co. Ltd. The defendant firm have their head office at Bombay, but they have a branch office at Lahore. The amount is claimed on account of the refund of premiums paid by the plaintiffs on insurance policies and damages for the wrongful cancellation of these policies. The plaintiffs also claimed an amount on account of the loss of interest.

[3] The question for decision, therefore, is whether a suit of this nature is triable at Lahore. Section 20, Civil P. C., provides that a suit must be instituted in a Court within the local limits of whose jurisdiction the defendant resides or carries on business or the cause of action, wholly or in part, arises. The place where a corporation carries on business is defined in Expl. 2 of this section which reads as follows :

"A corporation shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

[4] The suit, therefore, can be entertained at Lahore if it is shown that the defendant firm carries on business at Lahore or the cause of action, wholly or in part, arose at Lahore. If neither of these conditions obtains, then the Lahore Courts have no jurisdiction to hear the case.

[5] The first point to consider is whether the defendant firm can be said to carry on business at Lahore. The trial Court has held that the Lahore office is only a branch office and does not do any business independently. It is more or less in the nature of a post office which works under instructions received from the Bombay Head Office. The learned trial Court also found that in view of Expl. 2 to S. 20 the defendant firm can only be said to transact business at Lahore in respect of a cause of action arising in Lahore and as no part of the cause of action on which the appellant's suit is based arose at Lahore, the defendant firm cannot be deemed to carry on business at Lahore.

[6] The learned counsel for the appellants argued that the branch office at Lahore does in fact carry on the firm's business. He cited A.I.R. 1918 Pat. 126,¹ 98 P. R. 1918,² 14 Lah. 42,³ I. L. R. (1943) 1 Cal. 564⁴ and A. I. R. 1944 Cal. 1.⁵ In all these cases, however, the cause of action, wholly, or in part, arose at a place where the branch office of the corporation was situated.

[7] In A.I.R. 1918 Pat. 126,¹ the question that came up for decision was whether certain securities lying at Calcutta could be attached in execution of a decree pending in a Court at Patna. The execution arose out of a decree obtained against the treasurer of the Bank of Bengal, who was posted at Patna. The securities, which were

lying at Calcutta, had been furnished by the treasurer at Patna. The Patna High Court held that these securities could be attached. The judgment did not specifically deal with the matter which has arisen in the case before me but the following observations may be quoted :

"A corporation may be said to reside wherever it carries on its business, irrespective of the location of its head office, and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction."

I take this to mean that a corporation may be sued at a place where its branch office is situated in respect of a cause of action arising at that particular place.

[8] 98 P.R. 1918² was a case in which a certain firm had its head office at Lahore with an agent working at Lyallpur. A Hindu lady living at Lyallpur, who was subscriber to a relief fund started by the firm, died at Lyallpur. Her daughter brought a suit against the firm at Lyallpur. It was held that the firm could be said to carry on business at Lyallpur because it had an agent there. This was clear because the death of the subscriber was a part of the cause of action, and as this death had taken place at Lyallpur the firm could be said to transact business at Lyallpur by virtue of Expl. 2 to S. 20, Civil P. C.

[9] This ruling was followed in 14 Lah. 42.³ In that case the defendants had a branch at Amritsar and it was held that the branch carried on business at Amritsar because the cause of action on which the plaintiff's suit was based arose at Amritsar. The judgment does not contain a specific reference to Expl. 2, but the facts given in the judgment show that the plaintiff resided at Amritsar and had dealings with the firm at Amritsar and these dealings were the basis of his suit. Therefore, the cause of action had arisen at Amritsar and the defendant firm which had a branch at Amritsar must be deemed to carry on business at Amritsar.

[10] I.L.R. (1943) 1 Cal. 564⁴ arose out of a suit against an insurance company having its head office at Lahore. The company had a branch office at Dacca and the suit was instituted at Dacca. Here, too, the cause of action had arisen in part at least at Dacca because the man who had taken out the insurance policy had died at Dacca, and it is obvious that the death of an assured person is a part of the cause of action in a suit for the recovery of the money due on the insurance policy.

[11] A. I. R. 1944 Cal. 1⁵ is a similar case. In that case it was held that the agent was exercising considerable discretion and was not acting as a

mere post office; but in that case too a part of the cause of action had arisen at the place where the suit was instituted.

[12] As against these cases the learned counsel for the respondent relied upon A. I. R. 1929 Mad. 347,⁶ A. I. R. 1935 Mad. 764⁷ and 167 I. C. 669.⁸

[13] In A.I.R. 1929 Mad. 347,⁶ it was held that where a life insurance company having its head office at Calcutta has an agency in Madras, but the agency does nothing but act as a post office for forwarding proposals and sending monies and not having any discretion in the matter either to conclude contracts or to vary them or to enter into them it does not carry on business in Madras.

[14] In A. I. R. 1933 Mad. 764⁷ a similar principle was laid down.

[15] 167 I.C. 669⁸ is a case in which an insurance company having its office at Bombay entered into a contract of indemnity at Bombay. The amount to be paid under the policy was payable at Bombay. The company had a sub-agency at Karachi and it was held that the suit could not be brought at Karachi but must be instituted at Bombay.

[16] It is, therefore, clear that the corporation can be said to carry on business at the head office or at the place where it has a branch in respect of a cause of action which arises, wholly or in part, at the place where the branch office is situated. If no part of the cause of action arises at the place of the branch office, the corporation cannot be said to transact business at that place. This is the only possible interpretation of Expl. 2, and not a single case cited before me has taken the contrary view. Therefore, the Courts at Lahore can only have jurisdiction if it can be shown that the cause of action, wholly or in part, arose within the jurisdiction of the Lahore Courts, otherwise the suit must be instituted at Bombay where the head office is situated or at some place where the cause of action, wholly or in part, arose.

[17] The next point to consider is whether any part of the cause of action arose at Lahore, and whether on this ground the Lahore Courts have jurisdiction to entertain the suit. The plaintiffs are residents of Jullundur City. The agent of the defendant firm met them there and took proposals from them. The usual medical reports and friends' reports were also obtained at Jullundur. The policies (proposals) and these reports were then sent to the Lahore office and the Lahore office forwarded them to the head office at Bombay. The acceptance of the policies (proposals) was made at Bombay. The evidence of the agent is that the Lahore office could not accept a proposal without the sanction of the Bombay head office. In fact the Lahore office

could not do anything independently and even the appointments of agents have to be sanctioned by the Bombay head office. The branch office at Lahore is in the nature of a post office which merely conveys proposals to the head office and acceptance to the assured persons. The refusal to pay the amount claimed by the plaintiffs was made by the Bombay office at Bombay. The premiums were received by the Lahore office and were credited to the account of the company.

[18] The meaning of the cause of action was considered in I.L.R. (1943) 1 Cal. 564.⁴ "Cause of action" was defined as

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but it comprises every fact which is necessary to be proved. Cause of action has no relation to the defence set up in the case."

In the present case the plaintiffs will have to prove that they made certain proposals, that those proposals were accepted and that the monies were paid by them. None of these facts took place at Lahore and the mere fact that the papers passed through the Lahore branch office does not mean that any part of the cause of action took place at Lahore. The Lahore office did nothing more than transmit the proposals and the acceptances. The plaintiffs in their plaint did not allege that any part of the cause of action had arisen at Lahore. In fact they based their case on the refusal of the defendants to pay the dues. This refusal took place on 26th July 1944, and was made by the head office at Bombay. The fact that the refusal was communicated to the plaintiffs through the Lahore office does not make any difference to the case. According to para. 14 of the plaint, the plaintiffs' case was that the Lahore Courts had jurisdiction to hear and decide the suit as the defendant carried on business at Lahore. No other ground was alleged by the plaintiffs. It has been found that the defendants do not carry on business at Lahore within the meaning of S. 20, Civil P. C.

[19] In A. I. R. 1933 Mad. 764,⁷ the question of where an insurance policy had been effected was considered. The insurance company had its head office at Calcutta and a local agent at Madras. The policy was put through by the local agent and the proposal was accepted by the insurance company by its directors in Calcutta. The letter of acceptance was posted in Calcutta and it was held by the learned Judges of the Madras High Court that the insurance policy was effected in Calcutta and not in Madras. The facts of the case before me are exactly similar. The proposal was effected through the agent of the company at Jullundur and was accepted by the head office at Bombay. Similarly the refusal to pay the

dues was made by the directors in Bombay. The acceptance of the policy and the refusal to pay dues therefore both took place at Bombay.

[20] A. I. R. 1929 Mad. 347⁸ is another authority on the same view. I have already referred to this case while considering the question of the place of business. In that case the branch office at Madras used to receive applications and monies and pass them to the head office at Bombay, as in the case before me.

[21] The evidence shows that proper receipts for all premiums could only be issued by the Bombay head office. A provisional receipt was issued by the Lahore office, but this was not considered binding on the company. It cannot, therefore, be said that the payments were made at Lahore and therefore part of the cause of action arose at Lahore. In my view, therefore, no part of the cause of action arose at Lahore and the Lahore Courts have no jurisdiction to entertain the suit on this ground.

[22] The learned trial Judge, therefore, came to the right conclusion in ordering the return of the plaint and I dismiss this appeal with costs.

G.B.S.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 58 [C. N. 20.]

MUHAMMAD MUNIR AND MOHD. JAN JJ.

Gurdev Singh s/o Pakhar Singh and others — Convicts — Appellants v. Emperor.

Criminal Appeal No. 698 of 1946, Decided on 9-1-1947, from order of Sessions Judge, Ludhiana, D/- 11-7-1946.

(a) Penal Code (1860), S. 302—Motive — Though motive is relevant proof of it is not essential where direct evidence of crime is strong and credible.

[Para 2]

(b) Evidence Act (1872), S. 118 — Interested witness — Murder case — Remote connection of prosecution witness as deceased's partner or mortgagor or tenant does not make him interested witness.

[Para 3]

(c) Penal Code (1860), S. 302—Evidence—Want of precision in eye-witnesses' account as to weapon used—Surprise attack by several persons — Want of precision may be due to honest mistake of witness.

[Para 4]

(d) Penal Code (1860), S. 302—Intention—Number of persons armed with formidable weapons administering prolonged, merciless and indiscriminate beating to man — Man dying of shock and haemorrhage — Offence is murder, although no vital part of body was hit—Intention to cause such injury as is likely to cause death must be presumed in such a case — Assailants returning to resume attack on finding that deceased was alive and was able to speak must be held to have intended to cause death.

[Paras 5 and 6]

(e) Penal Code (1860), S. 302—Sentence—Whether sentence of death or transportation should be imposed is discretionary with convicting Judge—Usual sentence is death unless there be extenuating circumstance—Reasons for imposing lesser sentence must be given and are open to revision — Instances of

extenuating circumstances are extreme youth of accused, young offender acting under instigation of elders, sudden quarrel and want of premeditation, acting on impulse of moment, etc.—Criminal P. C. (1898), S. 367. [Para 8]

Annotation: ('46-Com.) Criminal P. C., S. 367 N. 14.

(i) Penal Code (1860), S. 302 — Sentence — Premeditated murder.

In cases of premeditated murder, the usual sentence is death unless the conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband or other near relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying on an immoral intrigue with the woman.

[Para 8]

(g) Penal Code (1860), S. 302 — Sentence — Extenuating circumstance—Vicarious liability—Penal Code, Ss. 34, 149.

The usual sentence of death may be withheld in cases where a man is convicted of murder by reason of vicarious liability. Where death is intended and the murder is premeditated the offender should usually be sentenced to death irrespective of whether the vicarious liability arises by reason of S. 34 or S. 149. But where the common object of an unlawful assembly is the beating of a person and death is not intended but is a likely consequence of the riot, the death sentence is withheld from those who are only constructively liable, but is imposed on the particular member of the unlawful assembly who brought about the death. [Paras 8 and 9]

(h) Penal Code (1860), S. 302—Sentence—Murder premeditated and death intended and caused by merciless beating—That accused are young men of 20 and none of injuries was individually fatal is no reason for not imposing death sentence. [Para 9]

J. G. Sethi, Jhanda Singh and Abdul Aziz Khan
—for Appellants.

Anant Ram Khosla and Qamar-ud-Din
— for the Crown.

Munir J. — This is an appeal by Gurdev Singh alias Bawa, Ram Singh alias Ramji, Bhag Singh and Dial Singh, who have all been convicted by the learned Sessions Judge, Ludhiana, under ss. 302 and 148, Penal Code, and sentenced on the former charge to transportation for life and on the latter to one year's rigorous imprisonment each. Together with one Surjan Singh, who is still a renegade, (absconder?) they have been found to have been members of an unlawful assembly in prosecution of the common object of which Gurbakhsh Singh was murdered. (His Lordship after stating the facts of the case and the heads of argument on behalf of the appellants, observed as follows :)

[2] It must be said at the very outset that neither the evidence of the motive nor the motive itself is sufficiently strong. The prosecution have produced evidence to show that some time after the Diwali preceding the occurrence Gurdev Singh appellant had damaged the crop of Gurbakhsh Singh by letting canal water into it; and that some time in the month of November (Maghar) Gurdev Singh appellant had gone to the house of Gurbakhsh Singh deceased in a

drunken condition where he was beaten by the latter. This ordinarily would not be a sufficient motive for the kind of murder alleged to have been committed in this case and if the case for the prosecution is true we have no doubt that there must be some other motive for the outrage, which the police have not been able to discover; or which may not be known to any of the prosecution witnesses. Though motive is also relevant and may furnish strong corroboration of the evidence of the eye-witnesses, making their statements, other things being equal, more readily acceptable, the mere fact that no motive has been proved is not a sufficient answer where direct evidence against the accused is overwhelming and otherwise credible. The result of the case, therefore, depends upon the view that we take of the trustworthiness of the several witnesses for the prosecution who have given evidence against the appellants. In determining whether the evidence of the witnesses should or should not be accepted regard must, of course, be had to the probabilities and the other circumstances of the case. (His Lordship then proceeded) :

[3] Kaka Singh is an equally satisfactory witness and his evidence is corroborated by his own conduct in going to Chakar to give information of the occurrence to Durga Datt in the early hours of the night and at the police station in the early hours of the following morning. This witness was for some time a partner in cultivation with the deceased and had also mortgaged to him with possession some land which he himself took for cultivation as a tenant. This, however, does not make him in any way interested against any one of the appellants and his remote connection with the deceased as his mortgagor or tenant does not, in the absence of other evidence of interest, make him an interested witness. We consider that Kaka Singh, Mt. Mahan Kaur and Mt. Kaki have given a true account of the occurrence and have no hesitation in acting upon their evidence. (After further discussion of evidence, his Lordship proceeded) :

[4] The evidence against the appellants is uniform with the exception of Dial Singh whose presence, according to the evidence of Kartar Singh, is doubtful. We have already observed that we are basing our findings on the evidence of the other eye-witnesses and have decided to ignore the evidence of Kartar Singh. We are, therefore, unable to give to Dial Singh the benefit of doubt that Kartar Singh's evidence, if it had stood alone, would have created in his case. We consider that all the appellants were concerned in the attack on the deceased and are liable for it. The medical evidence shows that four different weapons were used by the assailants—one that caused punctured wounds, the

second that caused incised wounds, the third that caused contused wounds which could only have been caused by a blunt cutting instrument, and the fourth a blunt weapon. The number of assailants must, therefore, at least have been four and in this manner the evidence of the eye witnesses, who say that there were five assailants, receives corroboration also from the medical evidence.

It is true that none of the eye-witnesses says that any one of the appellants was armed with a blunt weapon, but in a case like this where the assault is by several persons and the victim of the assault and the bye-standers are taken by surprise it is difficult to expect precision about the weapons from the witnesses and an honest mistake about the matter is not only possible but likely, without any conscious intent to falsehood or exaggeration.

[5] The next question that requires consideration and determination is whether the offence committed is murder or culpable homicide or grievous hurt. The correctness of the conviction was not questioned by learned counsel for the appellants when he argued the appeal, and it was only when he was called upon to reply to the petition for enhancement of the sentence that it was suggested that the offence committed is not murder. The deceased suffered 34 injuries of which 14 were caused with sharp-edged and sharp pointed weapons including two which were grievous and the rest were caused with blunt weapons including one that was grievous. This estimate of the injuries, however, is an understatement because some of the injuries, which are described as single injuries, were bruises on extensive areas which could only have been caused by a large number of blows on that part of the body. Thus injury No. 27 consisted of a bruised area covering the whole of the back and the back of the right shoulder; injury No. 25 was a bruise of the antre lateral aspect of the whole of the left leg; injury No. 22 covered bruises on the whole of the left buttock and posterior and lateral aspect of the left thigh; injury No. 16 was a bruise covering an area of 10" x 4" on the antro lateral aspect of the right leg; injury No. 14 was bruises on the whole of the right buttock and the whole of the front and the lateral aspect of the right thigh; and injury No. 2 was a bruise 3" x 5½" over the dorsal and lateral aspect of the left upper arm. The three grievous injuries were: (1) An incised wound 1" x ½" and bone deep over the left hand, first inter-phalangeal joint of the index finger, palmer aspect. Both the ends of the bone were protruding out of the wound. The joint was cut. (2) One comminuted fracture of right tibia between injuries Nos. 17 and 18. (3) Fracture of the left 11th rib, 3¼" from its anterior end.

The death was due to shock and hæmorrhage caused by the injuries and must have occurred within a few hours of their infliction. It is obvious from this medical evidence that the deceased was given a merciless beating with different kinds of weapons and that this beating caused the death. If a number of persons armed with formidable weapons administer a prolonged, merciless and indiscriminate beating to a man and he dies by the consequent shock and hæmorrhage, the offence committed is murder, because the assailants in such a case must be attributed the intention to cause such injury as is likely to cause death, and they cannot be heard to say that they did not intend what was a likely result of their act and that they did not intend to cause death because either intentionally or by accident no vital parts of the body were hit. In the present case there was also one injury on the head of the deceased though it was not grievous because the skull was not fractured. This injury, according to the medical evidence, might in all probability have produced concussion of the brain. It cannot, therefore, be said that the deceased was not intended to be hit on a vital part of the body.

[6] Further the evidence of the eye witnesses is that when the assailants left the man for dead and he asked for water they again returned and resumed beating. If this evidence is accepted it can safely be held that the assailants did intend to cause death and not only such injury as was likely to cause death. The incident just referred to is deposed to by all the eye witnesses and was mentioned in the first information report which, as we have said, was made without any reason or opportunity for collaboration. The incident is so natural that it could not have been introduced in the first information report unless it had happened, as it in no way improved the case for the prosecution. Learned counsel argues that this incident has been invented in order to make what was no more than an offence of grievous hurt into an offence of premeditated murder. We are, however, unable to accept this argument because when the first information report was lodged, the man had not been examined either by the medical witness or by the investigating officer, and the witnesses, in view of the large number of injuries inflicted, could not have known that the deceased had not been hit on any vital part of the body. We accept as true the evidence of the eye-witnesses that the assailants returned to resume the attack when they found that the deceased was alive and could speak and hold that they intended to cause the death of the man. The offence committed is, therefore, murder and the appeal is dismissed.

[7] The application for enhancement of the

sentence may now be dealt with. The reasons given by the learned Sessions Judge for withholding the capital sentence in this case may be stated in his own words. He says :

"All the accused in this case are young men of 20 or below. None of the injuries inflicted to the deceased were individually fatal. In fact there is only one simple injury caused by a blunt weapon on the head and there is hardly any injury on the other vital parts of the deceased's body. Death was caused by shock and hæmorrhage because of all the injuries caused to him. Having regard to the nature of the injuries and the ages of the accused, I feel that it will be extremely hard to send all these four accused to the gallows. I think in this case the sentence of transportation for life under S. 302/149, Penal Code, would meet the ends of justice and I order accordingly."

This is the second case within a very few days and from the same locality in which on a conviction of murder the capital sentence has been withheld on the ground that the murderers are near about 20 and the death was caused not by hitting the deceased on a vital part but by reducing him to a pulp of bones and flesh. This course has been adopted without taking any evidence about the ages of the offenders and without considering the determining circumstance whether the murder was committed in the course of a sudden quarrel without any premeditation or preparation. Mt. Gurdial Kaur, the widow of the deceased, has, in support of her application for enhancement, put in certified copies of certain entries in the register of births and affidavits according to which none of the appellants is below 23. We do not, however, consider it necessary to take additional evidence in the case as we consider that even if three of the appellants are assumed to be 20 and one 19 years old, the sentence of death cannot be refused on this ground.

[8] The question whether in a given case the sentence of death or the lesser sentence of transportation for life should be passed is essentially a matter in the discretion of the convicting judge, but while exercising this discretion he must bear in mind the position that the usual sentence on a conviction of murder is death unless there be any extenuating circumstance. The law requires the judge to give reasons when he imposes the lesser penalty but the reasons given by him are not conclusive and are open to revision. It is only when any well recognised ground is found to exist that the judge is justified in withholding the capital sentence. It is impossible to lay down any general rule defining the classes of cases in which the lesser sentence may be imposed though, from time to time certain circumstances have been recognised by the judges who had to consider this question as valid grounds for imposing such sentence. One of these is the extreme youth of the offender, however brutal or premeditated the

offence; but there is no precedent for the proposition that a youth of 19 or 20 comes within this exception. Another ground for the lesser penalty is to be found in those cases where an offender, who does not come within the first exception, is young and acts at the instigation or under the influence of his elders. There are several cases in which young men of 20 and above have been awarded the lesser penalty because they joined their elders in the murder. Where the murder is committed in the course of a sudden quarrel and without premeditation or on the impulse of the moment it is usual not to pass the death sentence unless the circumstances be exceptional. In cases of premeditated murder, however, the usual sentence is death unless the conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband or other near relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying on an immoral intrigue with the woman. There is still another class of cases where the usual sentence may be withheld. These are cases where a man is convicted of murder by reason of vicarious liability. Where death is intended and the murder is premeditated the offender should usually be sentenced to death irrespective of whether the vicarious liability arises by reason of S. 34 or S. 149, Penal Code. But where the common object of an unlawful assembly is the beating of a person and death is not intended but is a likely consequence of the riot, the death sentence is withheld from those who are only constructively liable, but is imposed on the particular member of the unlawful assembly who brought about the death. These are some of the well-recognised cases where the lesser penalty may be awarded on a conviction of murder, but the classification is neither exhaustive nor absolute and many a case may arise which is not covered either by the rule or by the exception. In such cases the matter rests in the discretion of the convicting Judge which cannot be fettered by any hard and fast rule.

[9] In the present case two reasons have been given for withholding the usual sentence neither of which, singly or considered with the other, can justify the refusal to pass the capital sentence. The first reason is that the offenders are young men of 20 but no precedent has been cited before us where in a case of premeditated murder and in the absence of a finding that the offender acted under the influence of elders he was not sentenced to death merely because of his being 20. On the other hand, there are several reported cases where men of this age on being found guilty of murder and in the absence of other extenuating circumstances have been sentenced

to death. In this case the offenders are not of extreme youth and there is no suggestion that any of them acted under the influence of any elder. The offence was premeditated because the offenders set out from their village and took the deceased unawares at a distance of $2\frac{1}{2}$ miles and beat him to death with different weapons. The other reason given by the learned Sessions Judge is that none of the injuries caused to the deceased was individually fatal. This may have a bearing on the question whether the offence committed is murder, but if it be held that the offence is murder there is no authority or precedent for the proposition that the death penalty may be withheld merely because the deceased was not finished by one stroke but was tortured to death, death of course having been intended. If we had found that the appellants did not intend to cause death but only to give a beating to the deceased and some one out of the appellants exceeded the original object of the unlawful assembly and caused death though death as a likely result was known to all the offenders, we would not have interfered with the sentence except perhaps in the case of the man who exceeded the object of the assembly and killed the deceased. But that is not the case here. The learned Sessions Judge finds it extremely hard to send all the four men to the gallows and seems expressly to hold that four lives should not be taken for one. Every sentence in a criminal case, whether it be a sentence of death or transportation or imprisonment, works hardship not only on the man sentenced but on others, but that has never been a circumstance which enters judicial determination of the sentence. Such cases of hardship are for the Provincial Government to consider and relieve and not for the judge. In the present case as we have held that the murder was premeditated and death was intended we would be putting ourselves in an illogical position if we did not pass the usual sentence. We have given our serious consideration to the question whether we could alter the conviction to one under S. 304, Penal Code, but as on the state of evidence in this case we have been forced to the conclusion that the offence committed is murder and that death was intended, we have no option but to accept the application for revision and to enhance the sentence in the case of each appellant from one of transportation for life to that of death. We therefore order accordingly. A copy of this judgment will be sent to the Provincial Government, but we make no recommendation in the matter.

G.N.

*Appeal dismissed.***A. I. R. (35) 1948 Lahore 62 [C. N. 21.]**

TEJA SINGH J.

Sri Ram s/o Thakar Das—Accused—Petitioner v. Babu Ram Wali Ram—Respondent.

Criminal Misc. No. 436 of 1947, Decided on 18-4-1947.

Criminal P. C. (1898), S. 107 — Solitary incident of beating at place by persons belonging to another district—Proceeding under S. 107 not justified. —

One solitary incident of beating at a place cannot justify the institution of security proceedings at that place against persons who belong to and reside at a place in another district when there is no chance of their visiting the former place in the ordinary course.

[Para 4]

Annotation. — ('46-Com.) Cr. P. C., S. 107, Note 10.

Hans Raj Sachdev — for Petitioner.*Manohar Lal Sachdev* — for Respondent.

Order. — These are four petitions before me arising out of two criminal cases, one under S. 107, Criminal P. C., pending in the Court of the Additional District Magistrate Lyallpur and the other a complaint under S. 323, Penal Code, pending in the Court of Mr. P. L. Sondhi, Magistrate 1st Class, Lyallpur. In both the cases Babu Ram, an orderly attached to one of the officers of the Irrigation Department at Lyallpur is the complainant.

[2] The respondents in the S. 107, Criminal P. C., case are Thakar Das, Ajudhia Das, Milkhi Ram and Siri Ram sons of Thakar Das and Munshi Ram while the accused in the S. 323, Penal Code, case are Ajudhia Das, Milkhi Ram, Siri Ram and Nanak sons of Thakar Das. Babu Ram as well as the persons against whom he has brought the criminal proceedings all belong to the district of Kangra, though Babu Ram himself, as I have already mentioned is at present employed at Lyallpur. The allegations contained in the petition under S. 107, Criminal P. C., were that the respondents bore enmity towards Babu Ram and his father, that there had been criminal litigation between them, that Babu Ram's father who is an old man possesses land which the other side have always been trying to take forcible possession of and that one of them came to Babu Ram's house at Lyallpur on the evening of 16-9-1946, decoyed him to a place outside the town and there all the five respondents gave him a beating. On these alleged facts Babu Ram apprehended danger to his life at the hands of the respondents and he considered that it was a fit case in which security proceedings be started against them. The petition was presented in Court on 21-9-1946, i.e., five days after the incident mentioned therein. The Magistrate recorded the petitioner's statement on the 19th and after taking the evidence of one witness ordered notice to issue to the respondents. The complaint under S. 323, Penal Code, which was instituted on 8-10-1946, referred to an incident

of 3rd October in which, according to Babu Ram the four accused mentioned above participated and gave him a beating. Along with the complaint, Babu Ram produced a medical certificate in which it was mentioned that he was medically examined and was found to have seven injuries consisting of six slight bruises and one scabbed wound. In this case the complainant's statement under S. 202, Criminal P. C., was recorded on 21st October and on the strength of it processes were issued to all the four accused. Siri Ram son of Thakar Das who figures in both the cases has now made the four petitions to this Court. In two of them, it is prayed that the criminal cases pending against him and his father and others should be transferred from Lyallpur to some Court in Kangra District and in the other two it is submitted that the proceedings in both the cases be quashed.

[3] The position of Siri Ram is that both the cases to which his petitions relate are false and the outcome of the enmity that exists between the parties. It is also urged that Thakar Das father of Siri Ram had brought a complaint against three persons including Babu Ram under S. 323, Penal Code, in the Court of an Honorary Magistrate at Kangra and the criminal proceedings started by Babu Ram were a counterblast to that complaint and were intended to exert pressure upon Siri Ram's father so that he might withdraw that complaint. Siri Ram has not only put in his affidavit in support of his allegations but has also produced a certificate bearing the signature of the Honorary Magistrate and the seal of his Court to the effect that Thakar Das's complaint had been pending in that Court since 19-8-1946, and warrants for the arrest of the accused persons were issued for 2-12-1946. Babu Ram who is present in Court with Mr. Manohar Lal Mehra has not considered it necessary to file a counter-affidavit controverting the allegations made by Siri Ram and all that Mr. Mehra is able to say in connexion with Thakar Das's complaint is that his client has no knowledge of it. In view of the affidavit as well as of the certificate produced by Siri Ram, I have no hesitation in coming to the conclusion that the plea which Babu Ram has urged through his counsel must be false and since he could not have the courage of denying the factum of Thakar Das's complaint in so many words he has taken the only safe course open to him, viz., urging that he had no knowledge of it.

[4] As regards the S. 107 case I have no doubt that there was absolutely no substance in it. Here are four persons, all belonging to Kangra district alleged to have travelled all the way from there to Lyallpur in order to do harm to Babu Ram because of their enmity with his

father and even though they were able to decoy him to a lonely place outside the town and even though they all belaboured him, the result was a few bruises and a slight contusion. And then Babu Ram took no action for five days. Apart from this one solitary incident of the kind alleged by Babu Ram could not justify the institution of security proceedings at Lyallpur against persons who belong to and reside in Kangra district when there was no chance of their visiting Lyallpur in the ordinary course. What surprises me is that a Magistrate of the position of an Additional District Magistrate should have considered it necessary to set in the machinery of law and to issue processes against the respondents. For these reasons, I quash the proceedings in that case. The petition for the transfer of this case becomes infructuous and is dismissed.

[5] As regards Babu Ram's complaint under S. 323, Penal Code, since it is supported by a medical certificate it deserves to be enquired into. But, taking into consideration the fact that all the accused belong to Kangra district and the complaint was instituted in Court a few days after the alleged incident which according to Babu Ram resulted in injuries to him, I consider that in the interests of justice it should be transferred from Lyallpur to some Court in Lahore.

[6] During the last few months while dealing with transfer petitions I have formed the impression that the number of false and frivolous complaints at odd places and sometimes at places which are away from the home place of the other party, and with the intention of harassing the other party, is daily growing and Courts of law owe it as a duty to themselves as well as to the public and the administration to take stringent steps to put an end to them. I should not be understood to mean that I have come to the conclusion that Babu Ram's complaint belongs to that category. All that I wish to observe is that Siri Ram's allegations require to be carefully investigated and should the Magistrate who is to try the case come to the conclusion that it was a false case and the accused were dragged to Lyallpur without any rhyme or reason, he should consider the advisability of awarding them substantial compensation and in addition starting criminal proceedings against the complainant under S. 211, Penal Code.

[7] The petition for quashing proceedings in the complaint case must fail *ipso facto* and is dismissed. The petition for the transfer of that case is, however, accepted. The case is withdrawn from the Court of Mr. P. L. Sondhi and the record of it is forwarded to the District Magistrate, Lahore, with the direction it should be entrusted to a stipendiary Magistrate at Lahore. The parties' counsel have been directed to cause

their respective clients to appear before the District Magistrate, Lahore, to take his orders on 30-4-1947.

D.S.

Order accordingly.

A. I. R. (35) 1948 Lahore 64 [C. N. 22.]

ABDUL RASHID C. J. AND MAHAJAN J.

Hanuman Chamber of Commerce Ltd. Delhi—Defendants—Appellants v. Jassa Ram Hira Nand — Plaintiffs—Respondents.

Letters Patent Appeal No. 53 of 1946, Decided on 5-3-1947, from judgment of Bhandari J., in F. A. O. No. 98 of 1945, D/- 5-2-1946.

(a) Arbitration Act (1940), S. 39 (2) — Appeal under Cl. 10, Letters Patent (Lahore High Court) — Maintainability.

Section 39 (2) only refers to appeals a right to which is conferred by Ss. 100, 109 and 110, Civil P. C. Sub-section (2) does not take away the right of appeal conferred by Cl. 10, Letters Patent of the Lahore High Court either expressly or by necessary implication : 32 A.I.R. 1945 Mad. 184, *Dissent*. [Para 5]

(b) Arbitration Act (1940), S. 34 — Exercise of discretion — Interference in Letters Patent appeal.

The jurisdiction conferred by S. 34 is of a discretionary nature and where the discretion has been exercised by the trial Judge and the decision has been confirmed in appeal by a single Judge of the High Court, the High Court will not interfere in Letters Patent appeal with the exercise of that discretion unless it is capricious or arbitrary : (1911) 1 K. B. 783, *Ref.* [Para 9]

Cases referred :—

1. ('45) I. L. R. (1945) Mad. 564 : 32 A. I. R. 1945 Mad. 184, Radhakrishnamurthy v. Ethirajulu Chetty & Co.
2. (1911) 1 K. B. 783 : 80 L. J. K. B. 695 : 104 L. T. 368, Freeman & Sons v. Chester Rural District Council.
3. (1893) 1 Ch. 238 : 68 L. T. 472.
4. (1894) 2 Ch. 478 : 63 L. J. Ch. 521 : 70 L. T. 674 : 42 W. R. 483.

Badri Das and R. C. Soni — for Appellants.

J. L. Kapur and Harbans Singh — for Respondents.

Mahajan J.—This is an appeal under Cl. 10, Letters Patent, from a judgment of Bhandari J. The circumstances of the case are the following. The defendant, "the Hanuman Chamber of Commerce Limited" having its registered office at Katra Tobacco Delhi, carries on business of a clearing house for all kinds of transactions ready or forward, for the facility of its members and for clearing transactions between them. The plaintiffs, Messrs. Rai Bahadur Jassa Ram Hira Nand, are a firm carrying on business in partnership at Naya Bazar, Delhi. They are members of the defendant company and entered into various transactions with other members and got them registered with the defendant company. Certain transactions were made between 2-3-1942 and 7-3-1942, and certain others were made between 7-3-1942 and 18-4-1942. On the basis of these transactions the plaintiffs claimed that they were entitled to a sum of Rs. 49,481-7-9 from the defendants. In the alternative including certain other transactions they claimed a

sum of Rs. 38,374-0-3. This suit was instituted in the Court of Lala Tara Chand Aggarwal, Commercial Sub-Judge, Delhi, on 5-5-1944.

[2] The defendants put in an application on 10-7-1944 under S. 34, Arbitration Act, contending that there was an agreement between the parties to refer the disputes to arbitration and that the proceedings in the suit should be stayed. This application was resisted by the plaintiffs on a number of grounds. The learned Subordinate Judge after a consideration of all the points urged by both the parties reached the conclusion that the matter in dispute between the parties should not be referred to arbitration and that the suit could not be stayed. In the result the application was dismissed.

[3] An appeal against this decision was taken to this Court under S. 39, Arbitration Act, and was heard, as already said, by a learned single Judge. The learned Judge gave elaborate reasons for affirming the decision of the trial Judge and dismissed the appeal with costs.

[4] At the hearing of this Letters Patent appeal a preliminary objection was raised by Mr. Jiwan Lal Kupur to the effect that the appeal was incompetent. He referred to the provisions of S. 39, Arbitration Act, in support of his contention. This section is in these terms:

"An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order Cl. (v) staying or refusing to stay legal proceedings where there is an arbitration agreement"

Sub-section (2). No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council."

The learned counsel urged that the section in clear terms prohibits an appeal from an order passed in appeal, and that it only allows a right of appeal to His Majesty in Council. That being so, both expressly and by necessary implication, the section prohibits a Letters Patent appeal from a judgment of a Single Judge of this Court. In my opinion, the contention raised by the learned counsel is void of force. The section undoubtedly prohibits an appeal from an order passed in appeal, and it also mentions that nothing in the section shall affect or take away any right to appeal to His Majesty in Council, but no mention is made in this section about the right of a litigant to appeal within this Court from a judgment of a Single Judge to a Division Bench. That right of appeal has been conferred by Cl. 10, Letters Patent of this Court, and unless some provision of law is shown which in express terms takes away the right of appeal conferred on litigant he could not be deprived of it. It has to be pointed out

that the right of appeal is a valuable substantive right conferred on a party and before a party can be deprived of the exercise of that right it must be conclusively shown that the statute has taken away that right in express terms or by using language regarding which no two meanings are possible.

[5] Clause 10, Letters Patent is in these terms:

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment of one Judge of the said High Court . . . pursuant to S. 108 of the Government of India Act, made on or after the 1st day of February 1929, in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court."

It cannot be denied that the appeal which was heard by a Single Judge of this Court was heard by him in the exercise of the appellate jurisdiction in respect of an order made by a Subordinate Judge who was subject to the superintendence of this Court. That being so, an appeal under this clause clearly lay from the judgment of Bhandari J. The words of the section relied upon by Mr. Kapur only prohibit a second appeal, and have reference to appeals that are made to this Court under S. 100, Civil P. C. The expression 'second appeal' has seldom been used in respect to appeals which arise within this Court and which are very commonly described as 'inter-court appeals.' I am, therefore, of the opinion that sub-s. (2) of S. 39 does not take away the right that has been conferred on a litigant under Cl. 10 of the Letters Patent of this Court. It seems to me that this sub-section only refers to two kinds of appeals that are mentioned in the Code of Civil Procedure, namely those a right to which is conferred by S. 100, Civil P. C., and those the right to which is given by Ss. 109 and 110 of the Code.

[6] It is interesting to observe that Mr. Kapur was not prepared to contend that no appeal to the Letters Patent Bench lay in cases decided by a Single Judge of this Court in the exercise of the appellate jurisdiction under S. 104, Civil P. C. Sub-clause (2) of S. 104 in express terms says that no appeal shall lie from any order passed in appeal under this section. In other words, it prohibits a second appeal in cases where an appeal is heard by a Single Judge of this Court from orders under S. 104 of the Code. Mr. Kapur contended that he did not argue this matter and could not do so in view of a decision of their Lordships of the Privy Council. If that be so, then it is quite clear that the expression 'second appeal' used in sub-s. (2) of S. 39 has not been used in the larger sense in which the learned counsel while raising the preliminary objection suggested. A restricted meaning has to be

given to the expression 'second appeal' used in the sub-section for the reason that I have already stated. I may also observe that this sub-section was drafted in the year 1940 and the draftsman of the section, I presume, was fully aware that appeals under the Charters of the various High Courts were allowed from a decision of a Single Judge to a Division Bench. If he wanted to prohibit these appeals he should have clearly referred to this matter in the sub-section and should have used appropriate phraseology to that effect. Having not done so, it seems to me that it was never intended that the right of appeal conferred by the Charters of the various High Courts should be taken away by this sub-section.

[7] Reference was made by Mr. Kapur to a Bench decision of the Madras High Court in *I. L. R. (1945) Mad. 564*.¹ In this case a preliminary objection of a similar character was raised, and it was observed that the objection was sound. No reasons whatsoever were stated in support of this finding. With great respect, I might observe that as the decision states no reasons in support of this view, it cannot be used as a precedent for a decision of similar cases when the point arises before another Court. I am, therefore, with due deference to the learned Judges who decided the above case, not prepared to follow it, as, in my opinion, it does not lay down sound law. For the foregoing reasons the preliminary objection has no force and is disallowed.

[8] Two further matters were mentioned by Mr. Kapur, but it is not necessary to dilate on them as he did not very seriously press them.

[9] On the merits, in my opinion, this appeal is bound to fail. Section 34, Arbitration Act, on the basis of which this application was grounded, towards its concluding portion enacts that 'such authority may make an order staying the proceedings.' The jurisdiction conferred by the section is of a discretionary nature, and the first question for determination is whether any grounds have been made out for interfering with the discretion that has been exercised by the trial Judge and the exercise of which has been held valid by a learned Single Judge of this Court. It seems to me that in a Letters Patent appeal interference with the exercise of a discretion should not be made unless the exercise of discretion is capricious or arbitrary. This case certainly falls outside that rule. In this connection reference may be made to a case decided by Buckley L. J. This is the case in (1911) 1 K. B. 783.² At p. 790 the following observations occur which may be quoted *in extenso*:

"I so entirely agree with the robust good sense of Bowen L. J.'s language in *Jackson v. Barry Ry. Co.*,³

that if this matter had been for my judgment alone I should have been of opinion that this appeal ought to be allowed and an order made to stay proceedings. I cannot find that Mr. Priest has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind. To succeed the contractors must, in the language of Lindley L. J. in *Ives & Barker v. Willam*,⁴ 'attack the character of the engineer to such an extent, and in such a manner, as to shew that the engineers will probably be guilty of some misconduct in the matter of the arbitration; that they will not act fairly.' There is, I think, no such evidence in this case.

But the matter does not turn solely upon an investigation whether under the terms of the contract the parties are bound to accept the contractual arbitrator. It remains that S. 4, Arbitration Act 1889, gives a discretion, and that in two ways, namely, (1) the words are permissive, not imperative, for the verb is 'may make,' not 'shall make,' and (2) the jurisdiction to stay the proceedings arises if the Court is 'satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission.' Over and above the contractual rights, therefore, there exists this discretion in the Court. The Master of the Rolls is not satisfied that there is no sufficient reason why the matter should not be referred. Under these circumstances I do not think that the fact that another Judge of co-ordinate jurisdiction thinks otherwise establishes that there is no sufficient reason when one judge of the Court of Appeal is not satisfied on that point. From this point of view, I can concur with the order which the Master of Rolls has proposed."

As already pointed out, a learned Single Judge of this Court has carefully considered the matter and has refused to stay the suit and has affirmed the decision for which the trial Judge gave very good reasons.

[10] Rai Bahadur Badri Das argued that the learned Single Judge as well as the Subordinate Judge had not appreciated the situation of the Chamber in this case and on an erroneous impression that the Chamber was a real litigant in the case and was the person who was to gain or to escape some liability and was to be judge in its own cause, have declined to stay the suit. The learned counsel urged that the Chamber was merely an intermediary and had no personal advantage in the bargains that were arrived at between its different constituents. It seems to me that neither the learned Single Judge nor the Subordinate Judge was under an erroneous impression in this matter. Both the learned Judges very clearly stated that the position of the Chamber was that of a clearing house, and that being so in the transactions of third parties it could incur no liability of its own. But it was conceded by the learned counsel Rai Bahadur Badri Das that where the constituents made a default in the payments of any profits or losses, the Chamber had to pay from its own pocket to its constituents or on their behalf and it cannot therefore be said that the Chamber is a disinterested third party and

can always act as a judge in a fair manner. The contention of the learned counsel that the situation of the Chamber had not been properly appreciated by the Courts below is, therefore, not justified. The learned Single Judge has very rightly observed that the case involves an intricate question of law which possibly was not within the knowledge of the plaintiffs when they became members of this Chamber and signed an agreement to the effect that they would be bound by all the bye-laws and other rules of this Chamber. The question that arises in this case relates to the frustration of the contract by reason of the notification under the Defence of India Rules, and that is certainly an intricate question of law. An arbitrator ordinarily cannot decide such a question without referring the point to the decision of the Court. In such cases it has been ruled that complicated procedure of arbitration should be avoided. We have been referred to the articles and bye-laws of the Chamber in respect to arbitration. In spite of the ingenious arguments of Rai Bahadur Badri Das we have not been able to decipher very clearly the meaning of the language used in these bye-laws. I must frankly confess that I have not been able to discover the machinery of arbitration and how it is to function as contemplated by the bye-laws to which reference was made by the learned counsel. It seems to me that these bye-laws have been very vaguely drafted and do not convey any clear impression to a Court as to their meaning. In these circumstances the learned Single Judge as well as the learned Subordinate Judge were perfectly right in holding that the arbitration agreement was of a nature that it was not possible to enforce it in a Court of law.

[11] For the reasons given above, I see no force in this appeal which I would accordingly dismiss with costs.

Abdul Rashid C. J. — I agree.

D.H.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 66 [C. N. 23.]

MOHAMMAD SHARIF J.

Small Town Committee, Meham — Defendant - Appellant v. Lajje Ram and others — Plaintiffs — Respondents.

Second Appeal No. 539 of 1945, Decided on 23-1-1947, from decree of Senior Sub-Judge, Rohtak, D/- 1-12-1944.

(a) Punjab Small Towns Act (2 [II] of 1922), S. 24—Decision as to imposition of tax.

Rule 4 in Appendix C to the Act leaves no room for doubt that whatever the decision, as to the imposition of tax, of the Small Town Committee is, it must be reduced to writing and entered in the minute book. The mere fact that the imposition of a tax might be indirectly inferred from its inclusion in the budget will not make it a decision as contemplated by S. 24. The decision must be expressly taken. [Para 3]

(b) Punjab Small Towns Act (2 [II] of 1922), S. 26—Fresh decision as to imposition of tax not necessary after every five years.

Section 26 simply lays down that an assessment list shall be prepared periodically after every five years. It does not postulate that a fresh resolution regarding the imposition of tax is necessary if the tax is to continue after the period of five years. Consequently, when once a tax is validly imposed by the Small Town Committee it will not require any fresh resolution after every five years for its continued validity. The decision shall hold good till it is reversed. [Para 3]

(c) Punjab Small Towns Act (2 [II] of 1922), Ss. 21 and 22A — Imposition of tax under S. 21 (a) (ii) is not ultra vires — Government of India Act (1935), Ss. 100 and 143 and Sch. 7, List I, Item 54.

A tax imposed under S. 21 (a) (ii) of the Act is not a tax on income but is assessed "according to their circumstances." The expression would certainly include agricultural income and hence, would not come within Item 54 of List I of Sch. 7, Government of India Act. The imposition of such tax is not therefore ultra vires the powers of Provincial Legislature. Moreover, once such a tax is levied by a Small Town Committee prior to the commencement of Part 3, Government of India Act, its continuance is expressly saved by the proviso to S. 22A, Small Towns Act, until a contrary provision is made by the Central Legislature. Such a tax will also be saved under S. 143, Government of India Act : 22 A.I.R. 1935 Lah. 636 *Rel. on.*

[Paras 6 and 7]

Case referred : —

1. ('36) 16 Lah. 1073 : 22 A.I.R. 1935 Lah. 636 : 159 I. C. 1064, Saroop Singh v. Small Town Committee, Fatehgarh.

F. C. Mital — for Appellant.

Tek Chand — for Respondents.

Judgment. — This second appeal by the Small Town Committee has arisen under the following circumstances. The Small Town Committee, Meham, in Rohtak District, has imposed a tax under S. 21 (a) (ii) upon all residents of the small town "assessed according to their circumstances," and in the year 1942-43 a fresh assessment list was prepared. To this objections were duly taken and after they had been disposed of, an amended list was published. The plaintiff-respondents who are living in that town brought a suit for permanent injunction on the grounds that there was no resolution by the committee under S. 24 authorising the imposition of the tax; that the assessment list was not posted and proclaimed as required by S. 25; that no previous permission of the Provincial Government was obtained and that it was in contravention of the provisions of the Government of India Act. All these allegations were categorically denied by the Small Town Committee. The first Court held that no resolution to impose the tax was passed by the Small Town Committee as required by S. 24 and in its absence the imposition was illegal. The other grounds alleged in the plaint were found not proved. On appeal, the learned Senior Subordinate Judge affirmed the decree of the trial Court that no resolution

had been passed and also discovered another reason for the invalidity of the imposition, that is, "the units were not determined by the committee or by the president." The Small Town Committee has now come up in second appeal to this Court.

[2. It is not denied before me that the tax was first imposed in 1927 and has been in force since then. Under S. 26, Small Towns Act, an assessment list continues to remain in force for five years after which the list exhausts itself and a new one has to be prepared. In the year 1942-43 such a new one was prepared and this has led to the present suit. Section 21, Small Towns Act, recites the taxes which may be imposed by a Small Town Committee without getting the previous permission of the Provincial Government. In the present case we are concerned with cl. (a), sub-cl. (ii) which is the following :

"The committee may impose any one or more of the following taxes :

(a) A town rate in the form of a tax —

(ii) upon all residents of the small town assessed according to their circumstances provided that the amount assessed on any one person according to his circumstances shall not exceed Rs. 7-8-0 per month in any one small town."

The tax in dispute as already stated, was levied under this clause. Section 22 says that the committee may with the previous sanction of the Provincial Government impose a tax other than the one mentioned in the previous S. 21. Section 24 deals with the preparation of assessment list. This is as follows :

"(1) Every committee which decides to impose a town rate in the form of tax upon all residents of the small town assessed according to their circumstances, under S. 21 (a) (ii) shall, subject to such rules as the Provincial Government may make in this behalf, as soon as may be, prepare an assessment list of all residents of the small town.

(2) The tax shall be assessed in the following manner. For each person liable to assessment a unit to be called the assessment unit, shall be fixed. the amount of which shall indicate the relative tax-paying capacity of such persons in comparison with other assesseees. The total amount payable by any assessee will then be his assessment unit multiplied by a given factor which shall be the same for all assesseees and shall be determined as hereinafter provided with reference to the total amount to be raised from the tax.

(3) Every assessment list prepared under sub-s. (1) shall contain the following particulars :

(a) The names of the persons upon whom the tax is to be imposed; and

(b) The amount of assessment unit at which each such person is assessed."

Section 25 deals with the mode of publication and the right of the person included in the list to prefer objections on any of the matters referred to in sub-cl. (2). The committee is then required to pass an order after consideration of the objections. It is further provided in sub-cl. (3) that any person who feels himself aggrieved

against the order of the committee may within fifteen days of the pronouncement of such order, appeal to the Deputy Commissioner whose decision on such appeal shall be final. Section 26 lays down that every assessment list prepared under S. 24 and modified in accordance with any orders that may be passed under S. 25 shall remain in force for a period of five years provided that the committee may at any time amend an assessment list by inserting or omitting the name of any person whose name ought to have been, or ought to be, inserted or omitted, or by inserting or omitting any property which ought to have been, or ought to be, inserted or omitted etc., after giving notice to any person affected by the amendment, of a time, not less than one month from the date of service of such notice on which the amendment is to be made, and such person may, before the time fixed in such notice, make objection to such amendment in writing to the committee and may appeal against any order passed by the committee on such objection in the manner laid down in S. 25, and the provisions of S. 25 shall, as nearly as may be, apply to the disposal of any such objection or appeal. Sub-section (2) says : Every person whose name appears in an assessment list shall be furnished by the committee, free of charge, with a copy of the entry relating to such person in the assessment list in its final form after such modifications have been made as may be necessitated by any order passed under S. 25. Section 29 says that a committee may pass a resolution to propose the imposition of a tax under S. 22 of this Act and cl. (2) provides that when such a resolution has been passed the committee shall publish a notice, defining the class of persons or description of property to be taxed, the rate of the tax to be imposed and the system of assessment to be adopted. Sub-clause (3) gives right to an inhabitant of the small town to object to the proposed tax within thirty days of the publication of the notice.

[3] It is contended by the learned counsel for the appellant that in order to impose a tax, no resolution by the Small Town Committee was necessary. His argument is that where a resolution was considered necessary it is specifically mentioned as in S. 29 which deals with cases where a tax other than the ones mentioned in S. 21 has to be imposed and which requires the previous permission of the Provincial Government for its imposition. According to the learned counsel, all that the committee has to do under S. 24 is simply to take a decision as to the imposition of a tax and this decision might take any form and if the budget for the year includes a sum to be raised by way of tax it would amount to a decision. I cannot agree to that

interpretation. There are some rules framed under the Small Towns Act by the Provincial Government and on looking at the rules which are printed in Appendix C to the Act it would be clear that an agenda is prepared for the meeting of the committee and then Rr. 4, 5 onwards are given as to the way in which the business of a committee is to be transacted. Rule 5 may here be quoted with advantage :

"The proceedings of every meeting shall commence with a motion by the Chairman that the minutes of the previous meeting be confirmed. Such minutes shall ordinarily be taken as read, but if for any reason they have not been previously circulated to the members they shall be read before they are taken into consideration. Any member who was present at the previous meeting may object to the confirmation of the minutes by moving an amendment on the ground that any matter is not correctly recorded or expressed."

This rule leaves no room for doubt whatsoever that whatever the decision of the Small Town Committee is, it must be reduced to writing and entered in the minute book. The mere fact that the imposition of a tax might be indirectly inferred from its inclusion in the budget is not a 'decision' contemplated by S. 24 of the Act. It must be expressly taken. But the tax was imposed in 1927 and the decision was taken then. I do not find anywhere that after the lapse of every five years a fresh "decision" is needed. It was urged by Mr. Tek Chand on behalf of the plaintiff-respondents that S. 26 where it requires the preparation of assessment list after an interval of every five years, postulates that the resolution regarding the tax shall also be in operation for that period only and if after that period the tax is to continue, a fresh resolution is necessary. I do not find any warrant for this conclusion. Section 26 simply lays down that an assessment list shall be prepared periodically and nothing further. It may be that during the interval of five years many persons entered in the list might have died or ceased to live within the jurisdiction of the Small Town Committee or there might have been material alteration in their circumstances or for any other reason. Individual cases might be considered and the necessary correction or amendment made any time, but there must be a whole-sale revision after every five years. This is quite different from saying that the resolution to impose a tax also exhausts itself after five years. I would hold, therefore, that the tax which was first validly imposed by the Small Town Committee in 1927 did not, for its continued validity, require any fresh resolution after every five years. That decision shall continue to hold good till it is reversed and it is not the case of anybody that this has been done.

[4] It is not correct that proper assessment list was not prepared in the year 1942-43. There is

such a list on the record and I find that the Small Town Committee by its resolution No. 18 dated 7th July and 8th July 1942 adopted it for the year 1942-43 with the amendments made in accordance with S. 25. It was duly published and objections were invited within one month. I further gather that the plaintiffs themselves had filed objections and in some cases where they thought it necessary they had gone up in appeal. The plaintiffs' contention that the list was not duly published has been rightly negated by the two lower Courts.

[5] The new finding of the learned Senior Subordinate Judge that the "units were not determined by the committee or by the president" is also incorrect. It was never alleged in the plaint nor was any issue framed thereon. As a matter of fact, the units were determined and there is a note to that effect in the remarks column of the assessment list so prepared.

[6] In the end it was contended by the learned counsel for the respondents that the imposition of this tax was *ultra vires* in view of S. 100, Government of India Act. This contention is easily repelled by S. 22A, Small Towns Act which is as follows :

"Nothing in the two last preceding sections shall authorise the imposition of any tax which the Provincial Legislature has no power to impose in the Province under the Government of India Act, 1935 :

Provided that a committee which, immediately before the commencement of Part III of the said Act, was lawfully levying any such tax under either of those sections as then in force, may continue to levy that tax until provision to the contrary is made by the Central Legislature."

This tax, as already observed, was levied in 1927 and its continuance is saved by this section until a contrary provision is made by the Central Legislature. Section 100 says that the Federal Legislature alone has power to make laws with respect to any of the matters enumerated in list I in the Seventh Schedule to the Act. Item 54 of list I of Seventh Schedule was referred to in this connection. It is: "Taxes on income other than agricultural income." The tax in question is not a tax on income but is assessed "according to their circumstances." The phrase "according to their circumstances" does not necessarily mean income. In any case it would certainly include agricultural income.

[7] A similar question arose in 16 Lah. 1073.¹ A *haisiyat* tax of Rs. 40 per annum was assessed under S. 21 (a), sub-cl. (ii), Small Towns Act of 1922. It was held that :

"The imposition of the tax was within the power of the committee under S. 21 of the Act and the tax was, therefore, not *ultra vires*, and that the question whether the tax had been properly assessed as to amount could not come before the Courts. It was for the assessee to object under S. 25 to the amount and if he

was dissatisfied he could appeal to the Deputy Commissioner and his order would be final."

It was also held that "the word 'circumstances' in S. 21 is equivalent to 'means or material welfare,' that is, the money, etc., that comes into the assessee's hands from various sources." Section 143, Government of India Act might also be noted in this connection. It expressly saves all taxes etc., lawfully levied by any municipality or other local authority before the commencement of Part III of this Act, that is before 1-4-1937. This objection has no force and is overruled.

[8] The result is that I accept this second appeal and dismiss the suit of the plaintiffs with costs throughout. As the point involved is of great importance, I would grant leave for Letters Patent appeal.

K.S.

Appeal allowed.

A. I. R. (35) 1948 Lahore 69 [C. N. 24.]

TEJA SINGH J.

Chetu s/o Sansari — Convict — Appellant v. Emperor.

Criminal Appeal No. 455 of 1946, Decided on 23-10-1946, from order of Sub-Divisional Magistrate, Rupar, D/- 17-4-1946.

(a) Criminal P. C. (1898), S. 162 — Prosecution witnesses deposing as to statements made to police officer — Admissibility of.

Statement made by any person to the police officer in the course of an investigation of a case cannot be admitted in evidence except for the limited purpose mentioned in S. 162, and that too at the instance of an accused person. Thus the evidence about what was stated to the police officers by the witnesses which is given by the prosecution should not be admitted under any circumstances. [Para 3]

Annotation:—('46-Com.) Cr. P. C., S. 162, N. 10.

(b) Explosive Substances Act (1908), S. 5—Recovery of bomb and cartridges from place shown by accused is not sufficient to convict accused unless he is proved to have placed them there—Arms Act (1878), S. 19. [Para 4]

(c) Evidence Act (1872), S. 27 — Confessional statement by person not accused of any offence — Admissibility.

A confessional statement made by a person at a stage when he is not accused of any offence, and as a result of which certain articles are recovered is not admissible in evidence against that person under S. 27 when he is subsequently sought to be prosecuted in respect of those articles. [Para 4]

(d) Evidence Act (1872), S. 27 — First statement by person leading to discovery of articles—Subsequent statement that articles were placed by him — Admissibility.

By his first statement to the police the accused informed the police that a bomb and certain cartridges were lying hidden in a certain place. By his second statement which was made after the articles were recovered as a result of his first statement the accused confessed to having himself placed the articles at that place :

Held, that the second statement was not admissible in evidence against the accused as it could not be said

that the articles were recovered in consequence of that statement : 21 A.I.R. 1934 Lah. 786, *Rel. on.* [Para 5]

Case referred :—

1. (34) 21 A. I. R. 1934 Lah. 786 : 153 I. C. 228, *Chiragh Din v. Emperor.*

Amolak Ram Kapur — for Appellant.

Kartar Singh Chawli, Assistant Legal Remembrancer — for the Crown.

Judgment. — Chetu, a Brahmin, of village Railon, District Ambala, was convicted by the Sub-Divisional Magistrate, Rupar, under S. 5 of Act 6 [VI] of 1908 and was sentenced to five years' rigorous imprisonment. He was also convicted in another case by the same Magistrate under S. 19, Arms Act and was sentenced to one year's rigorous imprisonment. From the order of the Magistrate in the first case Chetu has preferred an appeal to this Court. The appeal from the order in the second case was originally instituted in the Court of the Sessions Judge, Ambala, but was later on transferred to this Court. As the evidence in both the cases is common this order will dispose of both the appeals.

[2] The prosecution case in brief was that Chetu had some sort of enmity with Sarwan Singh, Lambardar of his village. One day towards the end of December 1944, probably 27th December, Chetu went to Malkhan Singh, Foot-Constable, who was attached to the 3rd Reserve Guard, Rupar, and informed him that Sarwan Singh was in possession of a bomb and a number of cartridges, and that he was in a position to have the bomb and the cartridges recovered. Malkhan Singh passed on this information to Assistant Sub-Inspector Fateh Singh, the Commander of the Reserve Guard. The latter asked Malkhan Singh to verify for himself whether the information given to him by Chetu was correct. On this Malkhan Singh sent for Chetu and asked him to take him to the place where the bomb and the cartridges lay concealed. Chetu took Malkhan Singh to a heap of *charri* lying in front of Sarwan Singh's house, dug out therefrom the bomb and the cartridges and showed them to Malkhan Singh. Being satisfied of the truth of Chetu's statement Malkhan Singh allowed the bomb and the cartridges to remain where they were and reported the result of his mission to the Assistant Sub-Inspector. The Assistant Sub-Inspector then went and gave information to Khan Sahib Shujjat Ali Khan, Deputy Superintendent of Police. This gentleman organized a raiding party on 1st January 1945, and went to Sarwan Singh's village. Sarwan Singh was sent for and enquiries were made from him. After that it was Chetu's turn. He was sent for and interrogated and the story proceeds that he made a statement to the Deputy Superintendent of Police and his companions that the bomb and

the cartridges had been placed by him in the *charri* heap. The cartridges were recovered the same evening, but as it had become late nothing further was done with respect to the bomb. We are told that a guard was put on the heap of *charri* and Chetu was taken into custody. Next morning the party again went to the heap of *charri* and from there was recovered the bomb. Chetu denied having given any information either to Malkhan Singh or to any police official. He also denied having made any statement regarding the bomb and the cartridges or having helped the police in recovering the said articles.

[3] Before saying anything regarding the merits of the case, I cannot help observing that the record of evidence made by the learned trial Magistrate gives me the impression that he went on taking down whatever dropped from the witnesses' mouth regardless of the fact whether the averments could be admitted in evidence according to the provisions of the Evidence Act. Particular mention may be made in this connection of what, according to the police witnesses, was stated to them by other witnesses after they had got the information regarding the presence of the bomb and the cartridges. There can be no denying the fact that as soon as Chetu gave the alleged information to Malkhan Singh in spite of the fact that Malkhan Singh did not make a note of it or did not take any action, the statements made by other persons to him and to the other Police Officers came within the ambit of S. 162, Criminal P. C., and no evidence regarding them could be admitted. As has been pointed out by this Court times out of number no statement made by any person to the Police Officer in the course of an investigation of a case can be admitted in evidence except for the limited purpose mentioned in S. 162, Criminal P. C., and that too at the instance of an accused person. In this case the evidence about what was stated to the Police Officers by the witnesses was given by the prosecution and should not have been taken down under any circumstances.

[4] That the bomb and the cartridges were recovered by the Deputy Superintendent of Police from the heap of *charri* appears to be amply proved. But this recovery cannot by itself prove a case either under S. 5 of Act 6 [VI] of 1908 or S. 19, Arms Act, unless and until we connect with it the statements that the appellant was alleged to have made first to Malkhan Singh and then to the Deputy Superintendent of Police and to his companions. As regards the first statement, all that, according to Malkhan Singh, Chetu said to him was that Sarwan Singh had a bomb and some rifle cartridges with him. No doubt Malkhan Singh

also deposed that Chetu admitted having 'planted the cartridges and the bomb in the *charri* heap' but evidently he was then referring to the statement that Chetu made to the Deputy Superintendent of Police. Moreover, it may be pointed out that at the time Chetu made a statement to Malkhan Singh he was not an accused person, and even if it be assumed for the sake of argument that he did make some sort of confessional statement, and it was because of this that the bomb and the cartridges were recovered, it could not be admitted in evidence against Chetu under S. 27, Evidence Act. The second statement appears to be the more important of the two, and it is on the strength of that statement that the trial Magistrate has convicted the appellant. This is what the Deputy Superintendent of Police stated on the point:

"He (Chetu) told me that the cartridges and the bomb were concealed under the heap of *charri*, which lay in front of the house of Sarwan Singh Lombardar. He himself produced 44 cartridges of a .303 rifle buried from the *kikar* tree near the *charri* (dug out from near the *kikar* tree) and added that the bomb will also be produced. It was night time and therefore the further search was postponed till the morning. I placed a guard to watch the *charri* and kept the accused with me. The accused stated to me that he himself placed the cartridges and bomb there."

[5] It is clear from this statement that Chetu's confession that the cartridges and the bomb were placed by him was made after the recovery of the cartridges, so it cannot be said that the recovery of the cartridges took place in consequence of the statement. No doubt according to the witness, Chetu also made another statement to him that the cartridges and the bomb lay concealed under the *charri* heap, but this statement cannot be used as a basis for the finding that Chetu had anything to do with the concealment. In addition, it is clear from the evidence of the Deputy Superintendent of Police and Malkhan Singh that before the appellant stated anything to the Deputy Superintendent of Police, in fact even before the Deputy Superintendent of Police organised a raiding party and went to Sarwan Singh's village, the police was in possession of the information regarding the presence of the bomb and the cartridges in the *charri* heap. It cannot, therefore, be said that the recovery took place in consequence of Chetu's confessional statement to the Deputy Superintendent of Police. So the second statement could not be admitted in evidence either. This objection was raised before the trial Magistrate, but it did not prevail with him, because he thought that the previous statement which the appellant had made before Malkhan Singh and wherein he had given information regarding the existence of the bomb and the cartridges had not been made by him as an accused person.

It is true that Chetu was a free man at the time he first approached Malkhan Singh and made a statement to him; but this could only be a ground for not using that statement under S. 27, Evidence Act. As regards the second statement, the important fact was that at the time it was made the police was already aware that the bomb and the cartridges lay concealed under the *charri* heap. In what manner they had derived this information or who their informant was is absolutely immaterial. In A. I. R. 1934 Lah. 786¹ the question was whether a telegram given by the accused person could be admitted in evidence. The prosecution contended that it was in consequence of the telegram that they got a clue of the peons and the Babu in the Post Office. The learned Judges came to the conclusion that this was not correct, and since the appellant already knew one of the Babus the telegram could not be admitted in evidence. This is what they said:

"The question of the telegram has occasioned considerable argument. Charagi Din took the police to the Amritsar Post-Office and there pointed out the Babu who took delivery of the telegram and two peons in whose handwriting the original telegram was. There is no doubt that the evidence on this point is satisfactory. It has however been argued by counsel for Charagi Din that the evidence of the identification of the peons and the Babu in the post-office is inadmissible inasmuch as the police already knew who these officials were. There is no doubt whatever that Mohan Lal, the Babu, was known to the police before this identification took place. . . . If the police knew that some member of the staff in the post-office had written the telegram it would be extremely unlikely that they would not have made every effort to discover who these peons were. Section 27, Evidence Act, permits as much information to be admitted in evidence whether it amounts to a confession or not, 'as relates distinctly to the fact thereby discovered.' If a fact has been previously discovered by the police S. 27 would not apply."

[6] I, therefore, hold that the statements alleged to have been made by the appellant were wrongly admitted in evidence. There being no other evidence to show that either the bomb or the cartridges were placed in the *charri* heap by the appellant or that he was ever in possession of them, I have no option but to allow the appeal and set aside the appellant's convictions and sentences in both the cases. He shall be released forthwith.

N.S.

Convictions set aside.

A. I. R. (35) 1948 Lahore 71 [C. N. 25.]

ABDUL RASHID C. J. AND MAHAJAN J.

Fateh Mohammad and another—Defendants—Appellants v. Fateh Mohammad, Plaintiff and others, Defendants—Respondents.

Letters Patent Appeals Nos 200 and 201 of 1945, Decided on 11-2-1947, from judgment of Khosla J. in R. S. A. No. 294 of 1945, D/- 3-10-1945.

(a) Punjab Pre-emption Act (1 [I] of 1913), S. 17 — Interpretation — One pre-emptor equally entitled with other—S. 17 cannot defeat his right.

Section 17 merely lays down the method of distribution amongst rival pre-emptors or persons equally entitled to the right of pre-emption, and should be interpreted in a manner which makes it consistent with the opening words of the section as well as with S. 15 (b), *fourthly*. In other words, when two sets of pre-emptors have an equal right of pre-emption then the construction placed on S. 17 should be such as does not destroy the right of the one or of the other: S. A. No. 294 of 1945, *REVERSED*. [Paras 3 & 4]

(b) Punjab Pre-emption Act (1 [I] of 1913), S. 17 (c)—Shares of respective pre-emptors.

In view of the language of S. 17 (d), S. 17 (c) cannot be interpreted to mean that the shares of the respective pre-emptors should be in the proportion of their respective holdings. [Para 4]

(c) Punjab Pre-emption Act (1 [I] of 1913), S. 17 (c) and (e)—Applicability.

Section 17 (c) applies only to cases where both sets of pre-emptors are owners in a sub-division, and both of them are entitled to take a share in the *shamilat* in a certain proportion and has no application where one set of pre-emptors is not entitled to share the *shamilat* in any proportion whatsoever with the other set. The only other clause that can govern such a case is S. 17 (e) which is in the nature of a residuary clause: S. A. No. 294 of 1945, *REVERSED*. [Para 4]

(d) Punjab Pre-emption Act (1 [I] of 1913), S. 17 (b)—Applicability.

If a person is not an heir at all and he could not be one if he is entitled to a zero share, then S. 17 (b) could not be applied to such a case. [Para 4]

Nathu Lal Wadhera—for Appellants.

Shamair Chand and Parkash Chand—

for Respondents.

Mahajan J. — Letters Patent Appeals Nos. 200 of 1945 and 201 of 1945 arise out of the same matter and can be disposed of in one judgment. One Mali sold 19 biswas 10 biswansis of land to Nur Mohammad for a sum of Rs. 1800 on 16-6-1942. This sale led to the institution of two pre-emption suits by two rival pre-emptors. The first suit was instituted by Fateh Mohammad son of Ibrahim who claimed to have the superior pre-emptive right on the ground that he was a collateral of the vendor and also on the ground that he was a proprietor in the *patti* in which the land was situated. The second suit was instituted by Fateh Mohammad son of Kalu and another person Sardar Ali. They claimed to be cosharers in the *khata* in dispute and also claimed to be owners in the *patti* in which the land is situated. The trial Judge held that the plaintiffs in both the suits had equal pre-emptive rights on the ground of their being proprietors of the *patti* in which the land in dispute was situated. On this finding both the suits were decreed to the extent of one-half of the land each, on payment of Rs. 900 by each set of the plaintiffs. Fateh Mohammad, son of Ibrahim appealed against the decision of the Subordinate Judge and claimed to pre-empt the entire land. The appeal was allowed and a decree for the entire land was passed in

his favour. The rival pre-emptors, Fateh Mohammad and Sardar Ali filed two second appeals in this Court. These appeals were heard by a learned Single Judge who maintained the order of the lower appellate Court and dismissed both the appeals. The parties were left to bear their own costs in this Court. Against the decision of the learned Single Judge two Letters Patent Appeals above mentioned have been preferred.

[2] The learned Single Judge held that the plaintiffs in the two cases were both owners in the *patti* and had, therefore, an equal right of pre-emption in respect of the land in dispute. In view of this finding the respective shares of the two sets of plaintiffs had to be determined in accordance with the provisions of S. 17, Punjab Pre-emption Act. This section is in these terms:

"Where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption the said right shall be exercised

(a) if they claim as cosharers, in proportion among themselves to the shares they already hold in the land or property;

(b) if they claim as heirs, whether cosharers or not, in proportion among themselves to the shares in which but for such sale, they would inherit the land or property in the event of the vendor's decease without other heirs;

(c) if they claim as owners of the estate or recognised sub-division thereof, in proportion among themselves to the shares which they would take if the land or property were common land in the estate or the sub-division as the case may be;

(d) if they claim as occupancy tenants, in proportion among themselves to the areas respectively held by them in occupancy right;

(e) in any other case, by such pre-emptors in equal shares."

[3] The learned Single Judge considered that the case was governed by S. 17, cl. (c), and that being so, the land in suit was to be treated as common land of the *patti* and divided amongst the various pre-emptors in the proportion in which they would share the *shamilat* land of the *patti*. On the material on the record, it was found that the status of Fateh Mohammad son of Kalu and of Sardar Ali was that of *malik gabza*, that is to say, they were owners of their own holdings in the *patti* and had no right in the *shamilat*. The learned Judge in these circumstances took the view that their share in the *shamilat* being zero, they were not entitled to share the *shamilat* with the rival pre-emptor and hence could not exercise the right at all. The result of this decision is that though under S. 15 (b), *fourthly*, the plaintiffs in both the suits were held entitled to have equal rights of pre-emption, yet by reason of the application of S. 17, cl. (c), the suit of one set of the plaintiffs has been dismissed on the ground that they have no right whatsoever. It seems to me that the decision of the learned Single Judge suffers from an inconsistency. It holds that Fateh Moham-

mad son of Kalu and Sardar Ali have an equal right of pre-emption with Fateh Mohammad son of Ibrahim and at the same time it is found that the first set of plaintiffs cannot exercise that right at all i.e. they have no such right. Section 17, Punjab Pre-emption Act, merely lays down the method of distribution amongst rival pre-emptors or persons equally entitled to the right of pre-emption. That section cannot be interpreted in a manner so as to destroy completely the right of one who has been held to be equally entitled to it with the other.

[4] After a careful consideration of the various statutory provisions of the Act I have reached the conclusion that S. 17 (c) of the Act should be interpreted in a manner which makes it consistent with the opening words of the section as well as with S. 15 (b), *fourthly*. In other words, when two sets of pre-emptors have an equal right of pre-emption then the construction placed on S. 17 should be such as does not destroy the right of the one or of the other. The learned Judge further thought that the clause could not be interpreted to mean that the shares of the respective pre-emptors should be in the proportion of their respective holdings. That interpretation seems to be correct in view of the language of S. 17, cl. (d). In my opinion, however, the learned Single Judge was in error when he held that cl. (c) of S. 17 was applicable to cases of rival pre-emptors where one set out of them was entitled to share in the *shamilat* of the *patti* while the other set was not so entitled. In my judgment, cl. (c) of S. 17 has application only to cases where two conditions are fulfilled i.e. (1) where both sets of pre-emptors are owners in a sub-division, and (2) where both of them are entitled to take a share in the *shamilat* in a certain proportion. The clause, however, has no application where one set of pre-emptors is not entitled to share the *shamilat* in any proportion whatsoever with the other set. In other words, when the *shamilat* is divisible in certain proportions between both sets of pre-emptors, then this clause can be aptly applied. But where one of the persons has a zero share or has no share at all and is, therefore, not entitled to share it in any proportion with his rival, in these circumstances, this clause ceases to have any application whatsoever. The only other clause that can govern such a case is cl. (e) of the section. This is in the nature of a residuary clause. The basic principle of S. 17 is mentioned in its opening words and cl. (e) states that ordinarily rival pre-emptors having equal pre-emptive rights will share equally unless the case falls within any one of the cls. (a) to (d). The view that I am taking is also supported by the wording of cl. (b) of S. 17. This clause deals with the claim

of rival heirs. If a person is not an heir at all and he could not be one if he is entitled to a zero share, then cl. (b) could not be applied to such a case. Similarly, an owner in a recognized sub-division with a zero share in the *shamilat* is not entitled to share it in any proportion with his rival, and his case cannot fall within the ambit of that clause. Once his right is conceded under S. 15, the section dealing with the exercise of the right cannot defeat him. For the reasons given above, I am of the opinion that in this case the only clause applicable for division of the suit property between the two sets of plaintiffs held equally entitled to the right of pre-emption is cl. (e) of S. 17.

[5] It was argued by Mr. Nathu Lal for the appellants that the learned Single Judge was in error in deciding the case himself on the interpretation that he placed on cl. (c) of S. 17, and in not remanding it for determination of the points that arose for consideration under that clause. He contended that this point was raised for the first time in the Court of second appeal and that he could prove that his clients held other property with a share in the *shamilat* in the *patti* besides the one regarding which *fard* Ex. P-1 had been filed on the record. It was emphasized that if the proportions in which the two sets of plaintiffs were entitled to a share in the *shamilat* had to be determined, the case should have been remanded. It is not quite clear whether a request for a remand was made to the learned Single Judge. Mr. Nathu Lal says that he did make such a request while Mr. Shamair Chand is not prepared to support him on this point. It seems to me that at this stage an order of remand would not serve any useful purpose. It would unnecessarily prolong this litigation and may not result in any good to any of the plaintiffs. On the assumption that Mr. Nathu Lal's clients are only *malik qabza* in the *patti* while Mr. Shamir Chand's client is an owner in the *patti* with a share in the *shamilat*, it is evident that cl. (c) does not govern the case as the proportions in which they will share *shamilat patti* cannot be determined and do not exist. The rights of the two plaintiffs have in the situation to be determined in accordance with the rule laid down in cl. (e) of S. 17.

[6] For the reasons given above, I would allow this appeal, set aside the judgment of the learned Single Judge and of the Senior Subordinate Judge and would restore the decrees given in both the suits by the trial Judge. In the circumstances, I leave the parties to bear their own costs throughout in both the suits.

Abdul Rashid C. J.—I agree.

G.N.

Appeal allowed.

A. I. R. (35) 1948 Lahore 74 [C. N. 26.]

CORNELIUS AND FALSHAW JJ.

Ranjha and another—Convicts—Appellants v. Emperor.

Criminal Appeal No 901 of 1946, Decided on 12-5-1947. from order of Sessions Judge, Amritsar, D/- 11-10-1946

(a) Criminal P. C. (1898), S. 439 — Revision against acquittal—Power to alter finding of acquittal into conviction and enhance sentence.

Where an accused who was charged with an offence under S. 302 is convicted of an offence under S. 304 and the accused appeals against his conviction and there is also a revision petition filed by a private person against the acquittal under S. 302, though no appeal has been filed by the Government against the acquittal, the High Court in such circumstances has jurisdiction to alter the conviction from S. 304 to S. 302, Penal Code, and to impose the proper punishment: 28 A.I.R. 1941 Lah. 465 (F.B.), *Foll.* [Para 3]

Annotation: ('46-Com.) Cr. P. C., S. 439, N. 13, Pt. 13.

(b) Criminal P. C. (1898), S. 494 — Consent of Court—Judicial Act—Revision.

The mere withdrawal by the Public Prosecutor is of no effect: the consent of the Court must also be given in order that the result provided by the statute namely acquittal should follow. The giving of consent is a judicial act and it is open to the High Court sitting in revision to set aside the order of acquittal if the consent was improperly given. [Para 3]

Annotation: ('46 Com.) Cr. P. C., S. 494, Notes 4 and 10.

Cases referred:—

1. ('42) I.L.R. (1942) 23 Lah. 129: 28 A.I.R. 1941 Lah. 465: 197 I.C. 669 (F.B.), *Bawa Singh v. Emperor*
2. ('43) 208 I.C. 533: 30 A.I.R. 1943 Sind 161, *Emperor v. Milanmal Hardasmal*.
3. ('44) 20 I.C. 14: 30 A.I.R. 1943 Sind 162: I.L.R. (1943) Kar. 100, *Emperor v. Guhram Gul Muhammad*.
4. ('45) I.L.R. (1945) Nag. 505: 32 A.I.R. 1945 Nag. 104: 221 I.C. 203, *Provincial Government, C. P. and Berar v. Bipin Singh*.

Bakhshi Bhagat Ram — for Appellants.

Kartar Singh Gurdev Singh for the Advocate-General and Arjan Das — for the Crown.

Cornelius J. — The appellants, Ranjha and Buta, who are brothers, have been convicted under S. 304, Penal Code, by the Sessions Judge of Amritsar and sentenced to undergo eight years' rigorous imprisonment each. They have appealed, and there is also before us a revision petition filed by a son of the deceased Wasakha Singh and the latter's widow, praying that the conviction be altered to S. 302, Penal Code, and a suitable punishment be awarded. (After discussing the facts and evidence in the case the judgment proceeds) The learned Sessions Judge appears to have been impressed by the injuries found on the persons of Ranjha and Buta. He did not consider it "safe to hold that these were all self-suffered or self-inflicted merely because the prosecution witnesses do not admit that any of them was caused at that time" and he preferred to believe

that Wasakha Singh and Ranja Singh defended themselves with sticks. At another place in his judgment, the learned Sessions Judge records the conclusion that Wasakha Singh and the two accused persons had a quarrel at the boundary line, after which the latter chased Wasakha Singh with sticks and each gave him a violent blow at the head, but before this, the accused persons had themselves received a few but not severe blows. This conclusion would appear to have been induced to a material extent by the learned Public Prosecutor conceding that the accused persons appeared to have acted without premeditation upon a sudden quarrel in a sudden fight in the heat of passion, and it could not be held that they had taken undue advantage or acted in a cruel or unusual manner, for which reason the learned Public Prosecutor asked for their conviction only under S. 304, part 1, Penal Code. With this opinion the learned Sessions Judge agreed.

[2] As has been seen, there is not an iota of evidence to support the conclusion that the injuries of Wasakha Singh were caused in a fight of any kind. There is no indication that any violence was being offered to the two accused persons at the time when they hit Wasakha Singh or either immediately before or after. The mere presence of injuries on their persons at 11 P. M. that night when they appeared at Ajnaly proves nothing; such injuries can be manufactured without the least difficulty. They themselves do not connect the injuries they sustained with those caused to Wasakha Singh in any reasonable or intelligible manner. In the circumstances, the conclusions reached by the learned Sessions Judge cannot be sustained.

[3] In reply to the argument raised in the revision petition against the appellants, the learned counsel on their behalf contended firstly that it was not open to this Court to alter the conviction to S. 302, Penal Code, since there was no appeal by the Crown, and that at the most this Court could direct a re-trial. He further contended that the Public Prosecutor had expressly withdrawn from the prosecution of the accused persons under S. 302, Penal Code, and had asked only for their conviction under S. 304, Penal Code, and since the learned Sessions Judge agreed with this view, he contended that the case fell under S. 494, Criminal P. C., which provides that a Public Prosecutor may, with the consent of the Court, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried and upon such withdrawal, in a case where a charge has been framed, the accused shall be acquitted. The argument was that an acquittal recorded in such circumstances is not amenable

to this Court's jurisdiction under S. 439, Criminal P. C. Reference was made to a Full Bench decision of this Court in 23 Lah. 129,¹ where the facts were almost exactly similar to those of the present case. An accused person who had been charged under S. 302, Penal Code, was convicted under S. 304, Penal Code, and had appealed from his conviction and sentence to this Court. The High Court issued notice to him to show cause why the conviction should not be altered to S. 302, Penal Code. The question was raised whether, in the absence of an appeal under S. 417, Criminal P. C., it was competent for the High Court to set aside an order of acquittal under S. 302, either *suo motu* or on the application of the complainant, and it was held that there being an appeal by the convict, the Court had jurisdiction to alter the finding from S. 304 to S. 302, Penal Code, and thereupon in the exercise of its revisional jurisdiction, the High Court could pass a sentence of death or transportation for life as required by the merits of the case. It is thus clear that this Court has jurisdiction in the present case, there being both an appeal by the convicts and a revision petition by certain complainants, of which notice has been sent to the appellants, not only to alter the conviction to S. 302, Penal Code, but also to impose the proper punishment. As for the second argument, it seems to have no force whatsoever. The mere withdrawal by the Public Prosecutor is of no effect; the consent of the Court must also be given, in order that the result provided by statute, namely, an acquittal should follow. The giving of consent by the Court below is a judicial act, and it is open to this Court sitting in revision under S. 439, Criminal P. C., to set aside an order which followed upon the giving of such consent on the view that it was improperly given. Cases of a somewhat similar kind are reported in 203 I. C. 533² and 210 I. C. 14³ and assistance may also be derived from certain remarks made by a Division Bench of the Nagpur High Court in I.L.R. (1945) Nag. 505.⁴ In the two first mentioned cases, the same Division Bench of the Sind Chief Court held that the withdrawal of two cases which were being tried by a certain Sub-Divisional Magistrate by the Public Prosecutor acting under the instructions of the District Magistrate amounted to "most improper interference with the administration of justice" and they accordingly set aside the orders allowing withdrawal of the two cases and sent them back to the Magistrate in question for disposal according to law. In the Nagpur case, the point arose out of an order under S. 345 (2), Criminal P. C., whereby a Court sanctioned composition of an offence of cheating, such order having the effect of an acquittal, for the pur-

poses of S. 417 of the Code. Upon appeal by the Provincial Government, it was held that the sanction was wrongly given, as the case involved a matter of very grave public concern and the Magistrate was wrong in being guided solely by the considerations that where a private person is cheated the matter is not one of public concern, and that it was desirable that the previous friendly relations between the parties should be restored. Acting under S. 417, Criminal P. C., the learned Judges set aside the order sanctioning composition. In the present case, I am clearly of the opinion that if the acceptance by the learned Sessions Judge of the erroneous view of the case presented to him by the learned Public Prosecutor be regarded as implied sanction to a withdrawal for the purposes of S. 494, Criminal P. C., it is open to this Court acting under S. 439, Criminal P. C., to set aside such sanction.

[4] For these reasons, I would dismiss the appeal of Ranjha and Buta, and accepting the revision petition filed by Teju and Mt. Harkaur, I would alter the conviction in each case to S. 302, Penal Code and enhance the sentence to transportation for life.

Falshaw J. — I agree.

G.B. *Revision allowed; Appeal dismissed.*

A. I. R. (35) 1948 Lahore 75 [C. N. 27.]

CORNELIUS AND FALSHAW JJ.

Pakhar Singh — Convict — Appellant v. Emperor.

Criminal Appeal No. 1002 of 1946, Decided on 16-4-1947, from order of Sessions Judge, Lyallpur, D/- 30-10-1946.

Penal Code (1860), Ss. 302 and 304, Exception 4—Applicability—Sudden quarrel but no fight.

The accused had broken a water-spout in the house of one M. Accused promised to the deceased, who was the relation of M and who went to the accused to obtain satisfaction, not to do it again. Some days later, when the accused was hearing music at a marriage celebration the deceased came and for no reason at all started a quarrel with the accused over the water-spout. The accused who was in a state of drink declared that he would break it once again when the deceased persisted with his accusation. The deceased then dared him to do it again if he had the strength. The accused thereupon picked up a *lathi* lying nearby and gave a single blow on the head of the deceased, immediately causing his death:

Held that even though the accused might not have intended to kill the deceased he certainly intended to break his head and conviction under S. 302 was proper. There was nothing in nature of a fight, the deceased having offered no violence at all, though there was a quarrel and S. 304, Exception 4 could not apply: 3 A. I. R. 1916 Bom. 191, *Disting.* [Para 3]

Case referred :

1. (17) 41 Bom. 27 : 3 A. I. R. 1916 Bom. 191 : 36 I. C. 578, *Emperor v. Sardarkhan Jari thkhan.*

Khushwant Singh and Mahammad Anwar —
for Appellant.

Cornelius J.— The appellant, Pakhar Singh has been convicted by the Sessions Judge of Lyallpur under S. 302, Penal Code and sentenced to undergo transportation for life, for causing the death of one Jani of his village by means of a single blow of a *lathi* on his head. Jani at once fell down and lost consciousness, and he was dead in a few minutes. The post mortem examination revealed a large swelling 5" x 4" in front of the top of head, under which there was extensive fracture of both parietal bones, and the fronto-temporal and the fronto-parietal bones on the left side were opened up. Besides this, there was a large swelling with a small contused wound $\frac{1}{4}$ " x $\frac{1}{8}$ " deep to the bone on the left side of the back of the head, but there was no fracture underneath. All the witnesses are agreed that Pakhar Singh and Jani were standing face to face and that Pakhar Singh struck only one blow on the front of Jani's head. The extent of the injury indicates the use of great violence, and it is not unlikely that Jani fell over backwards like a ninepin, and thus sustained the wound and swelling on the back of his head. He also sustained abrasions on both elbows, as the result of his fall.

[2] The learned counsel for the appellant does not dispute the finding that Pakhar Singh struck Jani the blow which caused his death. It seems that Pakhar Singh had previously broken a water-spout in the house of his neighbour Mohammad Bakhsh, and Jani who was a relation of Mohammad Bakhsh and a friend of Pakhar Singh was sent to him to obtain satisfaction. Pakhar Singh on that occasion promised not to do it again. On the night of 19-6-1946, there was some music at the house of a sweeper whose daughter was being married, and at 9 P. M., Pakhar Singh was among the persons sitting at the shop of Harjindar Singh, P. W. 4, which is close to the place where the marriage was being held. Among others present there were Nazar Singh, P. W. 3, who had with him a *lathi* Ex. P-6 and Allah Dad, P. W. 5. The evidence of these three persons shows that Jani came up to where Pakhar Singh was sitting and, for no reason at all, started a quarrel with him over the water-spout. Pakhar Singh was in a state of drink, and although at first he was inclined to admit that he was in the wrong in breaking Mohammad Bakhsh's water-spout, when Jani persisted with his accusation, Pakhar Singh declared that he would break it once again. Then Jani dared him to do it again if he had the strength, and a witness Allah Dad has described the conversation between them on this point in some detail. His statement is as follows :

"Jani said Pakhar Singh you have not done right in breaking my water-spout." Pakhar Singh said that he

would break water-spouts like this. Jani asked him to show it now. Pakhar Singh picked up a *dang* lying nearby and gave a blow with it on the head of Jani."

[3] Nazar Singh, whose stick was used by Pakhar Singh to hit Jani, has stated that the latter also had with him a small stick, but he was not asked and did not say that Jani raised it or showed any sign of using it as a weapon of offence. Reading the ocular evidence of the prosecution as a whole which is quite un rebutted, it seems to me clear from the conversation which passed before the blow was struck that Pakhar Singh, even though he may not have intended to kill Jani, certainly intended to break his head. This inference follows from the fact that Jani had asked him immediately before to show him how he would break the water-spouts if he was strong enough, and Pakhar Singh proceeded to do so by breaking his head for him. There was nothing in the nature of a fight although there was a quarrel. Jani is not shown to have assaulted Pakhar Singh or even to have threatened him with the use of force, although it must be admitted that he invited the attack on himself by needlessly provoking Pakhar Singh in relation to a matter which had been settled, on a most inopportune occasion when he was probably flushed with drink and it may be, somewhat excited by the music as well.

[4] Learned counsel for the appellant attempted to argue that the offence lay under S. 304, Penal Code, on the ground that the blow was struck in the course of a sudden quarrel. He sought to take advantage of Excep. 4 to S. 300, Penal Code on this basis, but it is clear that the most important element of that exception is that there should be a fight i. e., at least an offer of violence on both sides, and in this case it is clear that Jani was not attempting or perhaps even intending to use force towards Pakhar Singh when the latter struck him. A Bombay case, 41 Bom. 27,¹ was cited where the offence of a person who, armed with a stick, hit the deceased from behind on the head a single blow which resulted in his death was held to fall not under S. 302, Penal Code but under S. 304, Penal Code. In that case, the deceased had threatened the accused who was a young man of about 17, shortly before the attack, and the accused thereupon lost his temper and fetched a stick. In the meantime the deceased had walked away from the spot, and when the accused returned he found him sitting at a short distance and facing the other way, and he thereupon struck him the fatal blow. The Sessions Judge had on these facts convicted the accused under S. 302, Penal Code and awarded a sentence of transportation for life. In dealing with the case the learned Judges of the Bombay High Court were impressed with the

fact that where death is caused by a single blow struck under the influence of passion, the precise intention of the striker is difficult to determine, particularly where a commonly carried instrument such as a *lathi* is employed, since it is not possible to be absolutely certain what degree of bodily injury was intended. Another point which was stressed by the learned Judges was that in cases of that kind, Judges are much more disposed to take a liberal and less logical view and to look at all the surrounding circumstances with the object, if possible, of reducing the offence and so notwithstanding the character of the injury and the nature of the weapon, imputing a lesser intention to the accused.

"Holding that the case was of an exceptional nature which would warrant us, sitting here as Judges of final appeal, in taking what we have said might be a Jury's rather than Judge's point of view"

and feeling that a sentence of transportation for life was disproportionate to the real criminality of the act, the learned Judges concluded that it was possible that the blow which the accused struck "exceeded in violence the injury he had in view at the moment of striking it" and on these grounds, they thought that the killing could properly and legally be brought under S. 304, Penal Code.

[5] It is clear that the learned Judges did not purport to lay down any principles of general application in deciding that case. The grounds advanced for bringing the offence within S. 304, Penal Code, although no exception as specified in S. 300, Penal Code, was found to be applicable, seem to me, speaking with respect, to be altogether special to the case, which on its facts shows points of distinction from the present case, inasmuch as there had been a threat of violence offered by the deceased in the course of a quarrel shortly before the fatal blow was struck, and there was nothing to indicate that the striker had any thought of breaking his victim's head. The assessors in this case thought that the death of Jani was caused by chance, and this conclusion was apparently based on the considerations firstly that there was no enmity between the accused and Jani, secondly, if Jani had not raised the matter of the water-spouts there would have been no trouble, thirdly, that the accused used a stick which he picked up on the spot and fourthly that if the blow had not landed on Jani's head he would not have died. A desire to minimise the criminality of the act by urging lack of premeditation coupled with provocation appears from these opinions, but they do not show any departure from logical inference or any attempt at "imputing a lesser intention to the accused," such as is suggested by the Bombay case to be the common characteristic of juries. Consequently

I do not feel pressed in the present case, to take any view of the offence other than that which clearly arises from the proved facts, in relation to the relevant statute law, and I cannot see any ground for thinking that the accused struck with greater force than was necessary for causing the injury which he intended.

[6] Pakhar Singh while pleading not guilty put forward no plea in defence except that of false implication. He led no defence evidence. The conviction under S. 302, Penal Code accordingly appears to me to be correct, and the sentence of transportation for life is the least which could have been awarded by the learned Sessions Judge. I feel, however, that the mere awarding of the lesser penalty does not sufficiently allow for the fact that Pakhar Singh was needlessly provoked by Jani to an extent, which in the circumstances, he was unable to tolerate, and he seems to have acted in anger and yet not to have shown complete absence of restraint. Therefore, I consider that this is a proper case in which a recommendation might be made to the Provincial Government that in the exercise of power under S. 402, Criminal P. C., they may be pleased to commute the sentence to a term of rigorous imprisonment which might suitably be five years.

Falshaw J.—I agree.

D.H.

Conviction upheld.

A. I. R. (35) 1948 Lahore 77 [C. N. 28.]

ACHRU RAM J.

Fateh Mohd. — Defendant — Appellant v. Chiragh Din — Plaintiff — Respondent.

Second Appeal No. 2218 of 1945, Decided on 3-4-1947, from decree of Senior Sub-Judge, Ferozepore, D/-23-10-1945.

(a) Punjab Urban Rent Restriction Act (10 [X] of 1941), S. 10—Applicability—Tenancy determined without notice.

The language of S. 10 clearly shows that it applies only to cases of tenancies which can only be determined by the landlord by the service on the tenant of a notice to quit. The section can obviously have no application to a case where the tenancy is terminable without the landlord serving on the tenant any notice to quit, as where a tenancy is determined as a result of the efflux of time or in consequence of the breach by the tenant of any of the conditions of the tenancy, giving the landlord a right of re-entry or in consequence of the tenant repudiating the landlord's title.

[Paras 4, 5 and 6]

(b) Punjab Urban Rent Restriction Act (10 [X] of 1941), S. 2—Landlord and tenant—Relationship when ceases.

A reference to the definition of the words "landlord" and "tenant" in S. 2 clearly presupposes that the liability to pay and the right to receive is essential to constitute the persons concerned, landlord and tenant, within the meaning of the Act. As soon as the liability to pay and the right to receive rent has come to a termination the provisions of the Act governing the rights and obligations

inter se of landlord and tenants, whether in the matter of ejectment or otherwise, must be held to have ceased to be applicable assuming that they otherwise applied to the particular tenancy. [Para 10]

Jagan Nath Seth — for Appellant.

M. L. Sethi — for Respondent.

Judgment. — This is a second appeal from the decree of the learned Senior Subordinate Judge of Ferozepore, affirming on appeal the decision of a Subordinate Judge, granting the plaintiff a decree for recovery of Rs. 84 as arrears of rent against the defendant and for ejectment of the defendant from the *ihata* in dispute with costs.

[2] On 8-2-1940, Fateh Mohammad, defendant secured from Chiragh Din, plaintiff the lease of an *ihata*, with the superstructures existing therein situate in Jalalabad, in Muktsar Tehsil in the district of Ferozepore, for a period of ten years beginning with 8-2-1940 and ending on 7-2-1950, agreeing to pay rent at the rate of Rs. 4 per mensem. It was provided in the registered deed of lease executed on 8-2-1940, that in case of default by the tenant in the payment of rent for a consecutive period of six months, the landlord was to have the right to determine the tenancy and to eject the tenant before the expiration of the period of the lease, and also to recover the arrears of rent from his person and property of every kind. On 18-12-1944, the suit that has given rise to the present second appeal was instituted by Chiragh Din against Fateh Mohammad for possession of the demised *ihata* and for recovery of Rs. 84 arrears of rent for the period 8-3-1943 up to 8-12-1944. Another sum of Rs. 3-8-0 was claimed by the plaintiff on account of *pisai* alleged to have been agreed to be paid, in addition to the rent, at the rate of Rs. 2 per year, and to have been allowed to fall in arrears for a period of a year and a half. In the plaint it was alleged that the defendant having made default in payment of rent for more than six months i. e., from 8-3-1943, onwards, had forfeited his right to the tenancy and the plaintiff had a right to re-enter under the express terms of the lease. It was alleged that on 2-9-1943, a notice had been given to the defendant to vacate the premises but that he had failed to comply with the aforesaid notice. The suit was resisted by the defendant on a number of pleas on which the following issues were framed by the learned trial Judge :

1. Whether the plaintiff is exempted from the application of S. 10, Rent Restriction Act?

2. Whether defendant has paid the rent claimed in accordance with the term of the lease deed?

3. Relief.

On issue 1, it was held that it had not been proved that the Punjab Urban Rent Restriction Act had been applied to Jalalabad where the property in dispute was situate and that, under

the circumstances, S. 10 of the aforesaid Act was not a bar to the maintainability of the suit. Issue 2 was also decided against the defendant. In the result, the plaintiff was granted a decree for recovery of Rs. 84 on account of arrears of rent for a period of 21 months beginning from 8-3-1943, ending with 8-12-1944 as well as for possession of the suit property. The decision of the learned trial Judge having been affirmed by the learned Senior Subordinate Judge on appeal the defendant has come up in second appeal to this Court.

[3] Mr. Jagan Nath Seth learned counsel for the appellant, contended that a notification had actually been issued by the Provincial Government applying the Punjab Urban Rent Restriction Act to the locality where the suit property was situate and that the Courts below had erroneously refused to give effect to the provisions of S. 10 of the aforesaid Act. I am of the opinion that even if it is assumed that the Punjab Rent Restriction Act had been applied by the Provincial Government by means of a notification to Jalalabad where the suit property is situate, the present case is not affected by any of the provisions of that Act and the decree passed in the plaintiff's favour against the defendant cannot be set aside on the ground of its having been passed in contravention of the provisions of S. 10 of that Act.

[4] Section 10, Punjab Urban Rent Restriction Act reads as follows :

"10. (1) No order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Act and performs the other conditions of the tenancy :

Provided that the Court shall make an order for the recovery of possession if the landlord satisfies the Court that six month's notice to quit or notice of such period as may be required under the contract of tenancy, whichever be longer has been served on the tenant.

(2) Where any order of the kind mentioned in sub-s. (1) has been made on or after the first day of January 1939, but not executed before the commencement of this Act, the Court by which the order was made may, if it is of opinion that the order would not have been made if this Act had been in operation at the date of the making of the order, rescind or vary the order in such manner as the Court may think fit for the purpose of giving effect to this Act :

Provided that nothing in this section shall apply where the tenant has committed any act contrary to the provisions of cl. (o) or cl. (p) of S. 108, T. P. Act 1882, or has been guilty of conduct which is a nuisance or any annoyance to any adjoining or neighbouring occupier, or where the premises are reasonably and *bona fide* required by the landlord either for the erection of buildings or for his own occupation or for the occupation of any person for whose benefit the premises are held, or where the landlord can show any cause which may be deemed satisfactory by the Court."

The language of the section clearly shows that it applies only to cases of tenancies which can only be determined by the landlord by the service

on the tenant of a notice to quit. The Legislature has, subject to certain exceptions provided a minimum period of six months for such a notice. The section can obviously have no application to a case where the tenancy is terminable without the landlord serving on the tenant any notice to quit. A tenancy for a fixed term is one instance of such a tenancy. It determines automatically on the expiry of the period of the lease. On the expiry of such period, the erstwhile tenant becomes what is called a tenant by sufferance which has been held to mean nothing more and nothing less than a trespasser. Except where there is a renewal of the tenancy either by attornment with the consent of the landlord or otherwise, his possession at once becomes hostile to the erstwhile landlord and will after the expiry of 12 years mature into ownership. He is no more liable for rent although for the period during which he remains in wrongful occupation of the demised premises he may be sued for compensation for use and occupation.

[5] A tenancy, for a fixed term can be determined even before the expiry of such period, and without a notice to quit, where under the terms of the lease, the landlord has been given a right of re-entry on the breach by the tenant of any of the conditions of the tenancy.

[6] A third case in which a tenancy, whether for a fixed term or at will, can be determined, without the service on the tenant of a notice to quit is where the tenant repudiates the landlord's title.

[7] In either of the last mentioned two cases, the landlord has to do some act which may be regarded as an unequivocal manifestation of his intention to exercise his right of determining the tenancy in consequence of the forfeiture incurred by the tenant because a tenant may not determine the tenancy by any unilateral act of his own. In the provinces where the Transfer of Property Act is in force, S. 111 requires that the landlord should express his intention to put an end to the tenancy in the exercise of the right which has accrued to him by reason of the forfeiture incurred by the tenant by giving the latter a notice to that effect. This notice is not, however, a notice to quit but a mere intimation that the landlord agrees to the determination of the tenancy following upon the forfeiture and no longer looks upon the erstwhile tenant as a tenant. In the Punjab where the Transfer of Property Act is not in force, even such a notice is not necessary and the tenancy can be effectively determined by the landlord doing any other act which may reasonably be regarded as a sufficient indication of his intention to enforce the forfeiture, and in some cases the institution of a suit for possession has itself been

held to be a sufficient compliance with this requirement of the law.

[8] As pointed out above, on the determination of the tenancy, either by efflux of time or by forfeiture, the possession of the erstwhile tenant becomes wrongful and adverse and the erstwhile landlord gets an immediate right to dispossess him, for it is a trite proposition of the law that possession cannot be adverse against a person who has not an immediate right to possession. Section 10 does not in terms apply to such a case and it would be otherwise wholly unreasonable to extend its operation to such cases. It will mean that although the tenant has begun to prescribe for a full title, the erstwhile landlord cannot dispossess him.

[9] Every suit for the ejectment of a tenant of course presupposes a determination of the tenancy. Except in cases where the tenancy has otherwise determined by the operation of law i.e., by the expiry of the period of the lease or by forfeiture, the only way in which it can be determined is by the service by the landlord on the tenant of a proper notice to quit. The operation of S. 10 is confined only to such cases and as pointed out before, its effect is to prescribe, subject to some exceptions, a minimum period of notice.

[10] A reference to the definition of the words 'landlord' and 'tenant' in S. 2 of the Act clearly presupposes that the liability to pay and the right to receive rent is essential to constitute the persons concerned, landlord and tenant, within the meaning of the Act. As soon as the liability to pay and the right to receive rent has come to a termination the provisions of the Act governing the rights and obligations *inter se* of landlords and tenants, whether in the matter of ejectment or otherwise must be held to have ceased to be applicable, assuming that they otherwise applied to the particular tenancy. It cannot be disputed that on the determination of the tenancy by the operation of law, whether as a result of the efflux of time or in consequence of the erstwhile landlord taking advantage of any breach of the condition of the tenancy by the erstwhile tenant, giving him the right of re-entry, the right of the erstwhile landlord to receive and the liability of the erstwhile tenant to pay rent under the contract of the lease ceases. To a suit brought by the former for the dispossession of the latter, therefore, S. 10 of the Act can have no application.

[11] In the present case, the plaintiff based his right to dispossess the defendant on the ground that the latter had committed the breach of a condition of the tenancy, which breach according to the express terms of the lease gave him the right of re-entry, and that he had, by

means of a notice sent to the defendant on 2nd September 1943, manifested his intention to exercise his right of re-entry that had accrued to him on the defendant incurring a forfeiture by reason of default in payment of the rent for a consecutive period of six months. Under the circumstances, S. 10, Punjab Rent Restriction Act, cannot come into operation and cannot disentitle the plaintiff to the relief asked for by him.

[12] For the reasons given above, I see no force in this appeal and dismiss the same with costs.

V.R.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 80 [C. N. 29.]

BHANDARI J.

Fateh Mohd. — Convict — Petitioner v. Emperor.

Criminal Revn. No. 3099 of 1946, Decided on 7-7-1947, from order of Sessions Judge, Rawalpindi, D/-14-12-1946.

Penal Code (1860), S. 411 — Accused found in possession of stolen property — Presumption — Accused giving reasonable explanation — Effect — Evidence Act (1872), S. 114.

As soon as the prosecution produce evidence to the effect that the person has been found in possession of property which has been the subject-matter of theft, a presumption at once arises that the possessor is either the thief or the receiver according to the other circumstances of the case, and this presumption when unexplained is usually regarded by the Court as conclusive. But if a prisoner in a receiving charge puts forward a reasonable explanation which might be true a duty is cast on the prosecution to prove that the story is false if they wish to secure a conviction. In other words, the Court must decide whether the story is reasonable enough to have put the prosecution upon enquiry. If it is reasonable enough and is not proved false the prisoner must be acquitted: 1935 A. C. 462; 31 T. L. R. 88 and 33 T. L. R. 428, *Rel. on.*

[Paras 6 & 7]

Cases referred : —

1. (1935) 1935 A. C. 462 : 104 L.J.K. B. 433 : 153 L.T. 232, *Woolmington v. Director of Public Prosecutions.*
2. (1915) 31 T. L. R. 88; 84 L. J. K. B. 396 : 112 L.T. 480, *Rex v. Schama.*
3. (1917) 33 T. L. R. 428, *Rex v. Grinberg.*

M. F. Rahman — for Petitioner.

S. Aziz for Advocate-General — for the Crown.

Order.—Fateh Mohammad has been found guilty under S. 411, Penal Code and sentenced to nine months' rigorous imprisonment. He is dissatisfied with the orders of the Courts below and has come to this Court in revision.

[2] The house of one Inayat Ullah, a resident of Rawalpindi, was broken into on the night of 14-8-1946 and a considerable amount of property was stolen. The matter was reported to the police without loss of time but no clue to the perpetrators of the crime could be found.

[3] On the morning of 4-9-1946, one Qutab Din sold a pair of gold earrings to one Bhagwan Das, a goldsmith of Rawalpindi. The latter

denounced Qutab Din to the police the same day. During the investigation, he gave information which led the police to interrogate Fateh Mohammad petitioner. The latter opened a tin box and produced a pair of gold bangles and a gold kantha which were later found to be the property of Inayat Ullah. As a result of the investigation which followed Fateh Mohammad and two other persons namely, Qutab Din and Baloch were prosecuted under S. 411, Penal Code and were sentenced to rigorous imprisonment for a period of nine months each.

[4] Mr. M. F. Rehman who appears for the petitioner in this case frankly admits that as his client was found in possession of stolen property he must be presumed to be a thief or a guilty receiver. He contends, however, that this presumption has been amply rebutted by the conduct of his client immediately after he was interrogated by the police. As soon as the Sub-Inspector went to his house and asked him to produce the ornaments he opened a tin box and produced the ornaments in question. On being questioned by the trial Court as to the circumstances in which he had come into possession of these articles the petitioner replied that the co-accused Baloch had left the ornaments with him for safe custody. Two witnesses appeared in defence to state that towards the end of August 1946, Baloch had given a gold kantha and a heavy gold bangle to the petitioner for safe custody saying that it belonged to his mother. The veracity of these witnesses does not appear to have been challenged, for neither of these witnesses was cross-examined by the Crown.

[5] Mr. Abdul Aziz who appears for the Crown contends that the presumption of guilt which has arisen in this case has not been rebutted by the petitioner. He contends in the first place that it is extremely unlikely that Baloch considered a person of the status of the petitioner a sufficiently reliable man for depositing ornaments belonging to his mother. He argues that the mere fact that an accused person appears in Court and makes a statement does not invest the statement with any degree of truth and it is always the duty of the Court to scrutinize the statement in the light of the particular circumstances of the particular case with the object of seeing whether the statement can or cannot be considered to be reasonably true. If the Court comes to the conclusion that the statement is not true, the presumption of guilt which arises from the possession of stolen property continues to remain unrebutted.

[6] In the well-known case in 1935 A. C. 462¹ the House of Lords laid down the principle that the burden of proof is on the prosecution for all the facts that are material to the crime. In other

words, it is the duty of the Crown to establish beyond reasonable doubt that the prisoner is guilty. As soon as the prosecution produce evidence to the effect that the person has been found in possession of property which has been the subject-matter of theft, a presumption at once arises that the possessor is either the thief or the receiver according to the other circumstances of the case, and this presumption when unexplained is usually regarded by the Court as conclusive. But, if a prisoner in a receiving charge puts forward a reasonable explanation which might be true, a duty is cast on the prosecution to prove that the story is false if they wish to secure a conviction. In other words, the Court must decide whether the story is reasonable enough to have put the prosecution upon enquiry. If it is reasonable enough and is not proved false the prisoner must be acquitted. In (1915) 31 T. L. R. 88² the Court of Criminal Appeal presided over by Lord Reading, C. J. held that in a case in which a charge was made against a person of being in possession of recently stolen property, well knowing it to have been stolen, when the prosecution had proved that there had been recent possession of goods which had been stolen, the jury should then be told that they might, not must, in the absence of any explanation which might reasonably be true, find the prisoner guilty. But if a reasonable explanation had been given which might be true, then it was for the jury to say whether, on the whole of the evidence, they were satisfied that the prisoner was guilty. If the jury thought that the explanation which had been given might reasonably be true, although they were not convinced that it was true, the prisoner was entitled, to be acquitted, because the Crown would have failed to discharge the onus imposed upon it by the law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. In such a case the burden of proof never changed; it always rested upon the prosecution. In a later case, (1917) 33 T. L. R. 428³ Lord Darling observed that

"in the first place it was for the prosecution to prove their case against the prisoner. If such a case was proved, which in the absence of some explanation by the prisoner would be conclusive against him, it was only reasonable that he should provide the jury with some ground for acquitting him. That had been called 'giving a reasonable explanation of how the prisoner came to be in possession of the stolen property.' If the prisoner gave the explanation it was still for the prosecution to satisfy the jury that he was guilty, and in that sense the burden of proof was always on the prosecution. It never so shifted on to the prisoner that the prosecution had a right to say, 'if the prisoner does not prove himself innocent he ought to be convicted.' To the very last it was for the prosecution to prove that the prisoner was guilty."

[7] In the present case, the petitioner has
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given a reasonable account of the circumstances in which he came into possession of property which was recovered from his box. By giving this explanation he has rebutted the presumption which arises that a person who is found in possession of stolen property is either a thief or a receiver of stolen goods. The prosecution have not produced any evidence to show that the explanation given by the petitioner is false.

[8] For these reasons, I would accept the petition, set aside the order of the Courts below and direct that the petitioner be acquitted. He was released on bail by a learned Judge of this Court. He will not surrender to his bail bond.

D.S.

Petition allowed.

A. I. R. (35) 1948 Lahore 81 [C. N. 30.]

RAM LALL AND RAHMAN JJ.

Kundan Lal and others—Convicts—Petitioners v. Emperor.

Criminal Revision No. 2029 of 1946, Decided on 1-5-1947, from judgment of Teja Singh J., D/- 29-10-1946.

Public Gambling Act (1867), Ss. 5 and 6 — Warrant issued to particular officer endorsed by latter to another officer — Warrant executed by such another person — Presumption under S. 6 cannot be raised — Warrant under S. 5 and that under Criminal P. C. — Distinction.

The warrant issued under S. 5 is a special warrant and is not a general warrant of search which is usually issued under the provisions of Criminal P. C. S. 5, Gambling Act, requires a Court to decide that a particular person should be entrusted within the execution of the warrant and therefore the operation of Ss. 75 and 79, Criminal P. C., is automatically barred. Hence where a warrant is issued under S. 5, Gambling Act, to a particular officer and that officer instead of executing it himself endorses it to another officer and the warrant is executed by such another officer, the presumption under S. 6 cannot be raised: 22 P. R. 1895 (Cr.), *Holl.*; 30 All. 60, 7 A. I. R. 1920 All. 150 and 32 A. I. R. 1945 Nag. 216, *Dissent.*; 3 S. L. R. 56 and 7 A. I. R. 1920 Low. Bur. 49, *Rel. on.* [Paras 5, 6, 8 and 13]

Cases referred to:—

1. ('46) 47 Cr. L. J. 148 : 32 A. I. R. 1945 Nag. 216 : I. L. R. 1945 Nag. 649 : 221 I. C. 292, *Ram Prasad v. Emperor.*
2. ('95) 22 P. R. 1895 Cr, *Vir Singh v. Empress.*
3. ('08) 30 All. 60, *Emperor v. Kashinath.*
4. ('20) 42 All 385 : 7 A. I. R. 1920 All. 150 : 58 I. C. 241, *Mahadeo v. Emperor.*
5. ('09) 2 I. C. 371 : 3 S. L. R. 56, *Emperor v. Mithu.*
6. ('20) 54 I. C. 57 : 7 A. I. R. 1920 Low. Bur. 49, *Pothwai v. Emperor.*

K. C. Suri — for Petitioners.

Kartar Singh Chawla, A. L. R. for Advocate-General, Punjab — for the Crown.

Ram Lall J.—On 23-10-1945, a warrant was issued under S. 5, Public Gambling Act, by a Magistrate First Class at Jhelum directing Manohar Lal, Sub-Inspector of Police, to make a search in the house of one Fazal Ilahi and to execute the warrant. Manohar Lal instead of

executing the warrant himself, endorsed it on 1-11-1945 to Amar Nath and Mohammad Afzal, Assistant Sub-Inspectors, to execute the warrant with such help as may be necessary. The search was actually conducted by Assistant Sub-Inspector, Mohammad Afzal on 3-11-1945, and this officer on finding a number of persons present in the premises challaned them under the Gambling Act. The learned Magistrate, who tried the case, convicted Kundan Lal, Milkhi Ram and Mohammad Din under S. 4, Gambling Act, and sentenced them to pay fines, relying on the presumption under S. 6, Gambling Act, that any one found on the premises searched on a warrant under S. 5 was there for the purpose of gambling. An objection was taken before the learned Magistrate that the warrant, under cover of which Muhammad Afzal, Assistant Sub-Inspector, had entered the house in question was not a legal warrant inasmuch as it had not been executed by a person named in the warrant but by one of two persons to whom the person named in the warrant had endorsed it, and therefore the presumption under S. 6 of the Act could not be raised. This objection, however, was overruled and the Magistrate was of the view that the warrant issued under S. 5, Gambling Act, was equivalent to a warrant issued under ss. 96 and 98, Criminal P. C., and as such could be endorsed by the person named in the warrant to some other officer for execution. The learned Magistrate preferred to follow a decision of the Nagpur Court reported as 47 Cr. L. J. 148¹ rather than a decision of the Chief Court of Punjab reported as 22 P. R. 1895 (Cr.)²

[2] An application was made to the learned Sessions Judge, praying that a recommendation be made to the High Court to set aside the conviction as the warrant was illegal and the presumption, on which the conviction was based could not be made. The learned Sessions Judge has accordingly recommended that the conviction be set aside. He is of the opinion that the correct rule of law has been laid down in the Punjab case.

[3] When this reference by the learned Sessions Judge came before a Single Judge of this Court, he found that there was a conflict between the views of the Punjab Chief Court and of the Allahabad High Court, on which the Nagpur decision was based, and as the question was one of general importance, the case was referred to a Division Bench for decision.

[4] Section 5, Gambling Act, enacts that "if the Magistrate . . . upon credible information, and after such enquiry as he may think necessary, has reason to believe that any house, walled enclosure, room or place is used as a common gaming house, he may either himself enter, or

by his warrant authorise any officer of police," not below a specified rank to enter any such premises and the Magistrate, "may either himself take into custody, or authorise such officer to take into custody, all persons whom he or such officer finds therein, whether or not then actually gaming."

The section further goes on to say that the Magistrate himself may either seize or authorise such officer to seize all instruments of gaming, and may further authorise such officer to search all parts of the premises so entered when there is reason to believe that instruments of gaming are concealed therein.

[5] Section 6 enacts that when such instruments of gaming are found in a house, entered or searched under S. 5, it shall be evidence, until the contrary is made to appear that such house

"is used as common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or police-officer, or any of his assistants."

It will be noticed that S. 5 emphasizes that certain duties are to be discharged by an officer of the police entrusted to perform them in the warrant and it is only 'such' officer who can take possession of instruments of gaming or take into custody persons found in the house searched or insist on searching persons found in the house or other parts of the house if he has reason to believe that instruments of gaming etc., are concealed. It appears to me that the duties and functions to be performed by the officer deputed by the Magistrate are of a personal character which require the exercise of some discretion on the part of the officer deputed. Section 6 raises a statutory presumption on a search conducted under the provisions of S. 5. It appears to me, therefore, that the power of issuing a warrant is given to a Magistrate to be exercised by him when there are reasonable grounds in his mind for suspecting that a particular house is being used as a gambling establishment and he has to exercise his discretion to depute a particular officer to conduct a search of the premises. When the search is conducted by a person so nominated, statutory presumptions under S. 6 arise. The officer conducting a search is not told and does not know beforehand who is likely to be found in the premises to be searched and what instruments of gaming are likely to be discovered in the house and in conducting a search he is required to exercise his own judgment and discretion. In this sense it appears to me that this is a special warrant issued under the Public Gambling Act and is not a general warrant of search which is usually issued under the provisions of the Criminal Procedure Code. When a house is searched in execution of a warrant of

this character the law allows a presumption to be raised against all persons found in the house which they must rebut to escape punishment. When the Legislature has allowed such a presumption to arise, it is reasonable to assume that a safeguard was deliberately provided that the Court issuing such a warrant should exercise its discretion in nominating an officer in whom the Court had confidence. In this sense the officer named in the warrant becomes a delegate of the Court and it is a recognised principle of law that a delegate cannot delegate his own authority without reference to his principal. The Legislature apparently intended that in such cases the Court should see that the person appointed by it to exercise the functions and duties which the warrant enjoins upon him to perform is a person who can be trusted by the Court to perform them adequately. It is, therefore, a matter of selection of a police officer to perform specified acts and the selection is obviously one to be made by the Court and not by any other officer or person. If the warrant is allowed to be endorsed by the person so selected to another officer then the selection of the officer who performs the duties in execution of the warrant is a person selected by the officer who endorses the warrant.

[6] The warrants issued under the Criminal Procedure Code on the other hand are general warrants in the sense that any person otherwise entitled, can execute them and are not special warrants where a Court issuing the warrant has to select and specify the person to be entrusted with the duty of executing it. The language employed in the Criminal Procedure Code indicates that the question of the exercise of such a discretion by the Court is not involved, nor does the search lead to any statutory presumption. For instance, S. 75 deals with the form of a warrant of arrest and S. 77 provides to whom such a warrant shall be directed. A warrant can be directed under S. 78 to landholders or other persons for the arrest of an escaped convict or proclaimed offender, but there is no provision for a warrant issued under S. 78 to a landholder to endorse the same for execution by a person other than the person nominated in the warrant. It is apprehended that such a warrant can be executed legally by a nominated person or not at all. Section 79, however, specifically provides that when a warrant is directed to a police officer he can endorse it to any other police officer for execution. The reason for allowing this power of endorsement is that in the case of a warrant under the Criminal Procedure Code, the person or the article to be taken into custody or possession is known at the time of the issue of the warrant and no question of a statutory

presumption against unknown persons arises. It makes no difference, therefore, in the case of such warrants which person executes the warrant under Ss. 96 and 98. The provisions of S. 79 are made applicable to searches under S. 101, Criminal P. C.

[7] It appears clear, therefore, that warrants issued under the Criminal Procedure Code for arrest and search should be distinguished from special warrants directing specified persons for executing the same.

[8] It was pointed out by Mr. Kartar Singh Chawla that under S. 5, Criminal P. C., all offences under the Penal Code shall be investigated according to the provisions of the Code and all offences under other laws (and an offence under the Public Gambling Act would fall in this category), shall be investigated also according to the provisions of the Criminal Procedure Code subject, however, to any special enactment dealing with the manner of investigating. But the argument that immediately arises here goes contrary to the contention of the learned counsel for the Crown, because, as pointed out already, S. 5, Gambling Act, requires a Court to decide that a particular person should be entrusted for the execution of the warrant and, therefore, the operation of Ss. 75 and 79, Criminal P. C., is automatically barred.

[9] Turning now to the authorities the only two cases cited by the learned counsel for the Crown are 30 ALL. 60³ and 42 ALL. 385.⁴ In the latter case there is no discussion of the subject and the learned Single Judge, therefore, merely followed an earlier decision of the Court, for he says that the search warrant which had been endorsed by the police officer to whom it had originally been issued to another police officer was not irregular because,

"as pointed out by the learned Sessions Judge, this point is covered by authority in this Court: *vide* 30 All. 60.³ I have been asked to reconsider the soundness of this decision and my attention has been called to cases from other High Courts in which analogous questions have been considered. I think it sufficient to say that the Courts below were bound to follow the decision of this Court on the point and that I am not prepared to reconsider it."

The decision therefore is based on the decision in 30 ALL. 60³ without further discussion. In 30 ALL. 60³ the facts were similar to those in the present case and a warrant under the Gambling Act addressed to a Kotwal was endorsed by him to a Sub-Inspector. An objection was taken that a warrant executed by the second officer was illegal and therefore no statutory presumption should be made. The learned single Judge who decided the case, held that there was nothing in the Gambling Act which requires a Magistrate to specify a particular officer by name to execute

it. The warrant, according to him, was governed by the provisions of the Criminal Procedure Code. This reasoning appears to me to be incorrect for the reasons that I have already given and the learned Judge appears to me to have overlooked the language of S. 5, Gambling Act, which enacts that a Magistrate has to make a selection of the officer to execute the warrant under that Act and the officer nominated cannot exercise a discretion by endorsement as the discretion rests in the Court alone. The learned Judge also appears to have overlooked the other differences in language employed in the Criminal Procedure Code and in the Gambling Act and notably the fact that the Act leads to a statutory presumption for which there is no such provision in the Code which deals only with the apprehension and the custody of the known persons and objects. I am of the opinion, therefore, that the decision of the Allahabad High Court referred to above cannot be supported. The Nagpur case reported as 47 Cr. L. J. 148¹ merely follows these decisions.

[10] On the other hand in a case based on similar facts it was held in 22 P. R. 1895 (Cr.)² that a warrant addressed to a particular officer by name can be executed legally by that officer alone and where it has been executed by another the prosecution cannot rely on the presumption allowed by S. 6, Gambling Act.

[11] A similar view was taken by the Sind Judicial Commissioner's Court in 2 I. C. 371⁵ on a construction of the analogous provisions of the Bombay Prevention of Gambling Act. It is true that the words 'special warrants' appear in S. 6, Bombay Act, and the learned Judges were inclined to hold that a warrant under S. 5, Gambling Act was not a special warrant. I am not prepared to hold that warrants under the Gambling Act are not distinguishable from those under the Criminal Procedure Code.

[12] In 54 I. C. 57⁶ the Lower Burma Chief Court took the same view of the analogous provisions of the Burma Gambling Act and held that S. 101, Criminal P. C., was not applicable to warrants issued under that Act and that these could not be endorsed to another by the officer deputed to execute them. As pointed out in the Burma case, the provisions of the Gambling Act, which raise statutory presumptions are highly penal and such provisions must always be strictly construed.

[13] For these reasons I would accept the recommendation of the learned Sessions Judge, set aside the convictions and sentences of Kundan Lal, Milkhi Ram and Mohammad Din and direct that the fines, if paid, shall be refunded.

Rahman J.—I agree.

D.S.

Convictions set aside.

A. I. R. (35) 1948 Lahore 84 [C. N. 31.]

MOHAMMAD MUNIR J.

Suraj Parkash Ram Lal — Petitioner v. Emperor.

Criminal Misc. No. 843 of 1947, Decided on 16-6-1947.

(a) Criminal P. C. (1898), S. 491 — Arrest under S. 3, Punjab Public Safety Act—Application under S. 491—Official record of act of arrest not produced — Right of petitioner to require attendance of arresting officer for cross-examination — Punjab Public Safety Act (2 [II] of 1947), S. 3.

Where an application is made under S. 491, Criminal P. C., against an arrest and detention under Punjab Public Safety Act, the Crown seeking to defend the arrest should produce an official record of the act of arrest stating the fact that the arresting officer was satisfied that it was necessary to make the arrest with a view to preventing the arrested man from acting in a manner prejudicial to the public safety or to the maintenance of public order. Where instead of producing such record the Crown only produces an affidavit of the officer who effected the arrest under S. 3 (1), Punjab Public Safety Act, or an order of detention under S. 3 (2) of the Act committing the person arrested to custody, the petitioner can require the attendance of the officer arresting or directing the arrest of the detenu with a view to cross-examining him in regard to averments in the affidavit. Up to this stage the onus of justifying the arrest is throughout on the prosecution as the maxim *omnia praesumuntur rite esse acta* does not operate as the Crown does not produce any record of the official act containing the recital that the authority arresting or directing the arrest was satisfied that it was necessary to arrest the person with a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order. What is questioned in such cases is the original arrest and therefore the order of committal to custody drawn up under S. 3 (2) does not raise any presumption in favour of the regularity of the original arrest. The affidavit itself is not the record of an official act and does not give rise to the presumption that the original arrest was a valid official act. [Paras 3 & 4]

(b) Criminal P. C. (1898), S. 491 — Arrest under S. 3, Punjab Public Safety Act—Application under S. 491 — Determination whether arresting officer was personally satisfied that arrest was necessary — Court's duty.

Where an application under S. 491 is made against an arrest under S. 3, Punjab Public Safety Act, in determining whether the arresting officer was personally satisfied that it was necessary to arrest the detenu with a view to preventing him from acting in a manner prejudicial to the public safety or the maintenance of the public order, the Court cannot substitute its own judgment for the judgment of the arresting officer, nor can the Court go into the question whether the grounds on which the arresting officer acted were reasonable or sufficient, inquiry into any such question being barred by S. 43 of the Act. The short but difficult task that the Court has to perform in such cases is to read the mind of the arresting officer and if keeping in view the attendant facts the Court can accept the arresting officer's averments that he effected the arrest because he was satisfied that it was necessary to do so with a view to preventing the man concerned from acting in a manner prejudicial to the public safety, it must discharge the rule, however poor, illogical or absurd the grounds on which the officer acted may be, it not being a condition precedent to such arrests that the arresting officer had reasonable grounds to believe or reasonable

suspicion against the person arrested that unless arrested he would act in a prejudicial manner. [Para 5]

Where persons found in the vicinity of the scene of communal crime are arrested by the arresting authority in obedience to official instructions to arrest all men who might be found in the vicinity of the scene of communal crime and because he thought that they might commit acts of arson, it cannot be said that the arresting authority was himself satisfied that it was necessary to arrest these men with a view to preventing them from committing acts prejudicial to the public safety or the maintenance of public order. [Para 5]

(Arrest under S. 3 (1), Punjab Public Safety Act compared with detention under Rr. 26 and 129, Defence of India Rules, 1939).

Cases referred :—

1. ('46) I. L. R. 1946 Nag. 651 : 33 A. I. R. 1946 P. C. 123 : 73 I. A. 144 : 226 I. C. 50 (P. C.), Emperor v. Vimlabai Deshpande.
2. ('45) 32 A. I. R. 1945 P. C. 156 : I. L. R. (1945) Kar. P. C. 371 : 1945 F. C. R. 195 : 72 I. A. 241 : 221 I. C. 243 (P. C.), Emperor v. Sibnath Banerjee.
3. ('44) 1944 F. C. R. 1 : 30 A. I. R. 1943 F. C. 75 : I. L. R. (1943) Kar. F. C. 103 : 211 I. C. 241 (F. C.), Emperor v. Sibnath Banerjee.

K. S. Thapar—for Petitioner.

Abdul Aziz Khan for Advocate-General

—for the Crown

Order.—This is an application under S. 491, Criminal P. C., by Bakhshi Suraj Parkash alleging that one Ram Rakha is being illegally detained and praying that he be set at liberty. When the application came up for hearing on 3rd June 1947, a writ was issued by Mohammad Jan J., and the Crown was directed to produce, if the detenu was arrested under the Punjab Public Safety Act, the order of arrest, the report by the arresting authority to the Provincial Government and the order committing him to custody. The return to the writ, however, was only accompanied by an attested copy of the order committing the detenu to the custody of the Officer-in-Charge, the Central Jail, made by Mr. Mohammad Said, Magistrate First Class, under sub-s. (2) of S. 3, Punjab Public Safety Act. As this order did not show *prima facie* that the detenu had been arrested for any such reason as is mentioned in sub-s. (1) of S. 3 of that Act, I ordered the attendance of Mr. Mohammad Said for *viva voce* examination.

[2] During the last few days that I have been hearing habeas corpus petitions arising out of arrests and detentions under the Punjab Public Safety Act, I have found my court-room full of officers, who made the arrests or recorded the detention orders, waiting for examination when they should have been engaged in more important work in the town in these disturbed days. This seems to me to be due to the manner in which the Act is being administered by the officers, to whom powers to arrest or detain have been delegated by the Provincial Government. It is, therefore, necessary, that the exact legal position,

when such arrests or detentions are questioned by habeas corpus petitions, be fully stated with a view to avoiding, as far as possible, the appearance in Court of officers who are functioning under the Act.

[3] The first point to remember in this connection is that every arrest or detention is illegal unless authority for it is shown by the arresting or the detaining officer. When in an application under S. 491, Criminal P. C., an allegation is made that a person who has not committed any offence has been arrested or detained, the High Court cannot but issue a writ requiring the Court to show the authority for arrest or detention. If in reply to such writ, the Crown can only produce an affidavit of the officer who effected the arrest under sub-s. (1) of S. 3 of the Act or an order of detention under sub-s. (2) of S. 3 of the Act committing the person arrested to custody, the petitioner can require the attendance of the officer arresting or directing the arrest of the detenu with a view to cross-examining him in regard to averments in the affidavit and it is only after such cross-examination that the Court is in a position to determine whether the arrest was or was not within the limits of sub-s. (1) of S. 3 of the Act. Upto this stage the onus of justifying the arrest is throughout on the prosecution as the maxim *omnia praesumuntur rite esse acta* does not operate, not by reason of the fact that the objected official act was performed in exceptional circumstances (sequel to illustration (e) to S. 114, Evidence Act), but because the Crown does not produce any record of the official act containing the recital that the authority arresting or directing the arrest was satisfied that it was necessary to arrest the person with a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order. What is questioned in such cases is the original arrest and therefore the order of committal to custody drawn up under sub-s. (2) of S. 3 of the Act does not raise any presumption in favour of the regularity of the original arrest. The affidavit itself is not the record of an official act and does not give rise to the presumption that the original arrest was a valid official act. Therefore, if an arrest made under sub-s. (1) of S. 3 of the Act is sought to be defended in the above manner, the attendance of the officer arresting or directing the arrest becomes almost inevitable and a full enquiry opens on the question whether or not such officer was satisfied that it was necessary to arrest the person with a view to preventing him from doing any act prejudicial to the public safety or the maintenance of public order.

[4] An arrest under sub-s. (1) of S. 3 of the Act is different from an order of detention under

R. 26, Defence of India Rules, because in the latter class of cases the Crown almost invariably returned the writ of habeas corpus with a certified copy of the order made by the Central Government or the Provincial Government containing the recital that the Government that had acted in the particular case was satisfied with respect to the particular person that it was necessary to order him to be detained with a view to preventing him from acting in a manner prejudicial to the public safety or the maintenance of public order, and this recital justified the Court in presuming that the official act was regularly performed and in requiring the petitioner to show that the recital as to the satisfaction of the Government contained in the order of detention was wrong and that the detention had been ordered with some ulterior motive. In the case of arrests made under sub-s. (1) of S. 3 of the Act no antecedent or simultaneous record of the act is made, with the result that the Crown is not in a position to ask the Court to presume the regularity of the arrest. With one very important exception that will be presently pointed out, arrests under sub-s. (1) of S. 3 of the Act stand on the same footing as arrests that used to be made under R. 129, Defence of India Rules, which were not preceded or accompanied by an official record of the act containing the recital that the person arrested was reasonably suspected of having acted, of acting, or of being about to act in a manner prejudicial to the public safety. In the case of such arrests it was ruled by the Privy Council in I. L. R (1946) Nag. 651¹ that the onus of proving that the arresting officer reasonably suspected the person arrested of having acted, of acting, or of being about to act in a manner prejudicial to the public safety was on the Crown. It is true that sub-s. (1) of S. 3 of the Act differs from R. 129 in this respect that whereas what is required under sub-s. (1) is the satisfaction of the arresting officer while in the case of an arrest under R. 129 what was necessary was a reasonable suspicion on the part of the arresting officer. This, however, makes no difference so far as the burden of proof is concerned because in both cases the duty to defend the arrest is on the Crown though in one case this duty is discharged by proof of the fact that the arresting officer was satisfied that it was necessary to effect the arrest of the person concerned with a view to preventing him from acting in a manner prejudicial to the public safety or the maintenance of public order, while in the other it can be discharged by proof of the fact that the arresting authority reasonably suspected the person arrested, of having acted, of acting, or of being about to act in a manner prejudicial to the public safety. If therefore,

the Crown wishes to avoid the inconvenience involved in the attendance of the arresting officer in Court to defend the arrest, it can only do so, if practicable, by directing the officers arresting or directing an arrest under sub-s. (1) of S. 3 of the Act to prepare an official record of the act of arrest, such as used to be prepared by the appropriate Government in directing detention under R. 26, Defence of India Rules, stating the fact that the arresting officer was satisfied that it was necessary to make the arrest with a view to preventing the arrested man from acting in a manner prejudicial to the public safety or to the maintenance of public order. I quite realise that it may be impossible to make an antecedent or simultaneous record in a case where an arresting officer sees a particular person acting in a particular way, but no such case has so far come to my notice and even a subsequent record in such a case may as well invite the application of the maxim, *omnia praesumuntur rite esse acta*. Where, however, a large number of persons have been arrested not because the arresting officer saw them about to do something but because he received some information against them, there is no reason why such information should not be reduced to writing and a proper order recorded directing the persons concerned to be arrested. The question whether such information should be disclosed to the Court or not is a different question and must not be confounded with the question of the burden of proof and the application of the presumption that official acts have been regularly performed.

[5] Judging the present case in the light of the principles enunciated above the position that emerges is that the onus of proving that Mr. Mohammad Said, the arresting officer, was satisfied that it was necessary to arrest Ram Rakha with a view to preventing him from acting in a manner prejudicial to the public safety or the maintenance of public order is on the Crown. There is no official record of the act containing the recital that Mr. Mohammad Said was so satisfied and the report made by Mr. Mohammad Said to the Provincial Government under sub-s. (2) of S. 3 of the Act has not been produced, the only document produced being the order committing Ram Rakha together with fifteen other persons to the custody of the officer-in-charge, the Central Jail. No affidavit by Mr. Mohammad Said was enclosed with the return and all that he has stated in his evidence before me on the point in question is that he arrested these 16 persons because he thought that they might commit acts of arson. He says that he got that impression because some cases of arson had occurred in the locality and that when he went to the spot he found these men near the scene of the crime in suspicious

circumstances and on being questioned they did not give any satisfactory reply. In his order committing these men to custody he has stated that they were found "in the vicinity of the scene of communal crime under suspicious circumstances," but he explained in his evidence that this recital in the order was copied by his alhmad from a printed form which had been supplied to him to be used on such occasions. If that be so, I can only conclude that Mr. Mohammad Said had instructions—from whom I cannot say—that he was to arrest all men who might be found in the vicinity of the scene of communal crime under suspicious circumstances. If the arrests were made in pursuance of these instructions, it cannot be said that Mr. Mohammad Said was himself satisfied that it was necessary to arrest the 16 men including Ram Rakha with a view to preventing them from committing acts prejudicial to the public safety or the maintenance of public order. The arrest was, therefore, made not because of Mr. Mohammad Said's personal satisfaction in the matter but in obedience to some sort of artificial rule which Mr. Mohammad Said was required to follow. Mr. Mohammad Said gave his evidence before me in a singularly frank and straightforward manner, and I must say that had he stated before me that he was personally satisfied that it was necessary to arrest these men with a view to preventing them from acting in a manner prejudicial to the public safety or the maintenance of the public order, however, slender or inadequate the grounds for his satisfaction might have been, I would have held this detention legal, because in such cases the Court is not to substitute its own judgment for the judgment of the arresting officer, nor can the Court go into the question whether the grounds on which the arresting officer acted were reasonable or sufficient, inquiry into any such question being barred by S. 43 of the Act. The short but difficult task that the Court has to perform in such cases is to read the mind of the arresting officer and if keeping in view the attendant facts the Court can accept the arresting officer's averments that he effected the arrest because he was satisfied that it was necessary to do so with a view to preventing the man concerned from acting in a manner prejudicial to the public safety, it must discharge the rule, however, poor, illogical or absurd the grounds on which the officer acted may be, it not being a condition precedent to such arrests that the arresting officer had reasonable grounds to believe or reasonable suspicion against the person arrested that unless arrested he would act in a prejudicial manner. In the present case, however, Mr. Mohammad Said has not stated anything about his personal satisfaction and all that he has said is that he thought

that these men might commit some acts of arson. This is not tantamount to his being satisfied that unless arrested these men would commit some act of arson.

[6] I, therefore, accept this petition, hold that the detention of Ram Rakha is unjustified and set him at liberty.

[7] Since I dictated this judgment another case of arrest and detention under S. 3, Punjab Public Safety Act, has come to my notice to which I might usefully refer as an illustration in order to explain what I have said above. On receiving information that a certain person was instigating his community to create communal disturbance and rioting, the District Magistrate, Gujranwala directed him to be arrested by the following order:

"Whereas acute communal tension exists within the municipal limits of Kamoki, District Gujranwala and whereas I am satisfied that the following person is instigating and organizing the Sikh community to create communal disturbance and rioting in the town, therefore, with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of public order, I, Rai Bahadur Ch. Sundar Dass Midha, District Magistrate, Gujranwala, order that he may be arrested forthwith without warrant under S. 3 (1), Punjab Safety Act, 1947, and sent to District Jail, Gujranwala."

[8] In reply to a writ of habeas corpus, the Crown produced an attested copy of this order. The original onus was on the Crown to show that the man had been arrested with a view to preventing him from acting in a prejudicial manner but the moment this order was produced the Crown could claim to have discharged its onus as the order which was *ex facie* regular and contained a recital of the District Magistrate's satisfaction brought into operation the presumption that what was stated on the face of it was correct and that the condition precedent for the arrest was fulfilled. (A. I. R. 1945 P. C. 156² on appeal from 1944 F. C. R. 1.³) No occasion, therefore, arose to call the District Magistrate and the petition was dismissed as it lay on the petitioner to show that the arrest was invalid. This cannot be the result in cases where no proper record of the act of arrest is made and if made does not contain the recital that the arresting authority was satisfied that it was necessary to arrest the person concerned with a view to preventing him from acting in a prejudicial manner.

D.S.

Petition allowed.

A. I. R. (35) 1948 Lahore 87 [C. N. 32.]

BHANDARI J.

Faiz Ahmad Faiz, Editor, Pakistan Times, Lahore — Petitioner v. Emperor.

Criminal, Misc. No. 837 of 1947, Decided on 16-6-1947.

(a) Criminal P. C. (1898), S. 491 — Detention of person by Government — Question if detention is legal — Initial burden of proof — Shifting of—Return submitted by Government in response to writ of habeas corpus — Presumption as to its truth and regularity — Rebuttal.

It is a general rule of law of evidence that the party who alleges any matter in issue must prove it.

[Para 5]

The object of *habeas corpus* is to enable the Court to inquire into and determine the legality of the detention of a person who is restrained of his liberty. As a person is entitled to be at liberty unless he is restrained by process of law, initially the onus of proof lies on the custodian to establish that the restraint is under legal process. If he fails to make out a *prima facie* case the detinue must be released. If on the other hand, he produces an order which shows on the face of it that the detention is legal, the burden of proof again shifts and the detinue must prove all the facts necessary to show that the restraint is illegal. In view of the legal maxim that all acts are presumed to have been done rightly and regularly the facts set out in the return submitted by the Provincial Government in response to the writ are *prima facie* presumed to be true unless this presumption is rebutted by the production of convincing evidence to the contrary: (1883) 11 Q. B. D. 440, *Rel. on.*

[Para 6]

Annotation;—('46) Cr. P. C., S. 491, N. 7.

(b) Punjab Public Safety Act (2 [II] of 1947), S. 3 — "Is satisfied" — Proof — Subjective test.

Where a person is ordered to be arrested under S. 3, whether the authority issuing the order is "satisfied" within the meaning of that section must be proved by a subjective, and not by an objective test, because the authority making the order has access to exclusive sources of information, he is one of the high officers of State who by reason of his position is entitled to public confidence in his capacity and integrity and there is no justiciable issue in cases of this kind but merely an executive act which is not open to legal review. Where, therefore, in response to a writ of *habeas corpus* the Provincial Government produce an order of arrest under S. 3 that is a complete answer to the writ unless the good faith of the Provincial Government is successfully impugned and, as the order is issued under S. 3, it must be presumed that the fundamental requirements of law have been complied with and that the detention is not illegal: 1942 A.C. 206, *Foll.* [Paras 9, 10]

(c) Punjab Public Safety Act (2 [II] of 1947), S. 3 — Order under by Governor — Application under S. 491, Criminal P. C. — Affidavit alleging want of good faith — Necessity of filing counter affidavit — Criminal P. C. (1898), S. 491.

Where the Governor, who is the Provincial Government in the S. 93 regime, says that he is satisfied, his order is sufficient *prima facie* proof that he has acted lawfully and that the detention of the person detained under the order is not illegal, because, in the absence of proof to the contrary, credit should be given to public officers who have acted *prima facie* within the limits of their authority for having done so with honesty and discretion: (1869) 4 Ex. 222, *Ref.*

[Para 12]

Where an article by a newspaper reporter was published in a newspaper on a certain day and on the same day the Governor issued an order for his arrest under S. 3 and the detinue, who applied under S. 491, Criminal P. C., alleged in an affidavit that the order was not made in good faith because of this fact:

Held, that the fact was not sufficient to rebut the presumption of good faith which had arisen and there-

fore, did not necessitate the filing of a counter affidavit by the Crown.

[Para 12]

Annotation:—('46-Com.) Cr. P. C. S. 491, N. 7.

(d) Punjab Public Safety Act (2 [II] of 1947), S. 3 — Order under, by Governor—Question whether he had satisfied himself personally — Proof.

Where the Governor makes an order under S. 3 the question whether he had satisfied himself personally must be determined from the order itself, and if it says that the Provincial Government was satisfied, and the Provincial Government is the Governor under the S. 93 regime, in the absence of evidence to the contrary that recital must be presumed to be true.

[Para 14]

Cases referred:—

1. (1883) 11 Q. B. D. 440 : 52 L. J. Q. B. 620:49 L. T. 618 : 32 W. R. 50, *Abrath v. N. E. Ry. Co.*
2. (1942) 1942 A. C. 206:110 L. J. K. B. 724:166 L. T. 1:(1941) 3 All. E. R. 338, *Liversidge v. J. Anderson.*
3. (1869) 4 Ex. 222 : 38 L. J. Ex. 100 : 20 L. T. 927 : 17 W. R. 772, *East Derby v. Bury Improvement Commissioners.*
4. (1942) 1 All. E. R. 373:1942-2 K. B. 14 : 111 L. J. K. B. 475 : 166 L. T. 293, *R. v. Secretary of State for home affairs.*

Dr. Khalifa Shuja-ud-Din Maulvi, Ghulam Mohyud Din, Malik Shaukat Ali and Mahmud Ali
— for Petitioner.

Basant Krishan Khanna, Advocate-General —

for the Crown.

Order.—This application, made under S. 491, Criminal P. C., raises two questions upon the interpretation of S. 3, Punjab Public Safety Act, 1947, namely:

(a) whether the onus is upon the Provincial Government to prove the various acts which justified the making of the order for detention, and

(b) whether an allegation appearing in the affidavit filed by the petitioner that the order was not made in good faith imposes an obligation on the Provincial Government to file a counter affidavit controverting the said allegation.

[2] The petitioner is Lt. Colonel Faiz Ahmad Faiz, Editor of the Pakistan Times, Lahore. He has filed this petition for a writ of habeas corpus for the release of Mr. Mohammad Shafi, Chief Reporter of the Pakistan Times. The affidavit which accompanies the petition shows that on or about 9-5-1947, Mr. Shafi submitted for pre-censorship an article headed "Evan Jenkins following in the footsteps of his predecessors;" that after the submission of this article he saw the Home Secretary to Government, Punjab: that the Home Secretary refused to allow its publication in the Pakistan Times and advised Mr. Shafi not to send it to the Dawn; that Mr. Shafi ignored the advice tendered by the Home Secretary and sent the aforesaid article to Delhi where it was actually published in the Dawn of the 12th May, that the same day, the Provincial Government issued an order directing Mr. Shafi's arrest under S. 3, Punjab Public Safety Act, 1947, that after-

the arrest the petitioner saw the Home Secretary who stated that Mr. Shafi was rude to him during his interview; that the arrest and detention which was ostensibly made under S. 3 of the Act of 1947 was illegal as it was made *mala fide* and in bad faith, the object of the arrest and detention being to teach Mr. Shafi a lesson for not acting on the Home Secretary's advice, for being rude to him, and for having criticised the policy of His Excellency the Governor of the Punjab.

[3] The return submitted by the Provincial Government in response to the writ consists of two orders. The first order contains a declaration that the Provincial Government is satisfied with respect to Mr. Mohammad Shafi that with a view to preventing him from acting in a manner prejudicial to the public safety or the maintenance of the public order it is necessary to order his arrest under S. 3, Punjab Public Safety Act, 1947. The second order directs that the said Mr. Mohammad Shafi be committed to the New Central Jail, Multan for detention until 11-11-1947.

[4] Sub-sections (1) and (2) of S. 3 of the Act of 1947 are in the following terms :

"3. (1) The Provincial Government, the District Magistrate or any servant of the Crown authorised in this behalf by general or special order of the Provincial Government if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order it is necessary so to do, may arrest such person without warrant, or may direct the arrest without warrant of such person and in making such arrest any means that may be necessary may be used.

(2) An arrest made by or on the direction of any authority under this section other than the Provincial Government, shall be reported forthwith to the Provincial Government by the authority so making or so directing the arrest as the case may be, and the authority making the report may by order in writing commit any person so arrested to such custody as the Provincial Government may by general or special order specify in this behalf."

[5] The first question arising in this case is whether it is the duty of the Provincial Government, on its *bona fides* being challenged by the petitioner, to allege and prove the various acts which justified the making of the order. It is general rule of the law of evidence that the party who alleges any matter in issue must prove it. As pointed out by Bowen L. J. in (1883) 11 Q. B. D. 440¹:

"The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this : to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops

there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further if he wishes to win, rests."

[6] The object of a writ of habeas corpus is to enable the Court to inquire into and determine the legality of the detention of a person who is restrained of his liberty. As a person is entitled to be at liberty unless he is restrained by process of law, the officer or other person having custody of the detenu must state the grounds or cause of the restraint. In other words, a duty is at once cast on the custodian to establish by evidence or otherwise that he has lawful power to hold the detenu in custody. Initially, therefore, the onus of proof lies on the custodian to establish that the restraint is under legal process. If he fails to make out a *prima facie* case the detenu must be released. If on the other hand, he produces an order which shows on the face of it that the detention is legal, the burden of proof again shifts and the detenu must prove all facts necessary to show that the restraint is illegal. In view of the legal maxim that all acts are presumed to have been done rightly and regularly the facts set out in the return are *prima facie* presumed to be true unless this presumption is rebutted by the production of convincing evidence to the contrary.

[7] Dr. Shuja-ud-Din who has so ably represented the petitioner in this case does not challenge the correctness of the legal propositions enunciated above. He contends, however, that the mere production of an order purporting to have been issued by the Provincial Government is not a sufficient *prima facie* answer to the writ of habeas corpus particularly as the petitioner has put in an affidavit challenging the *bona fides* of the Provincial Government. According to him it is the duty of the Crown to show that the fundamental requirements of the law have been complied with. The Crown must establish to the satisfaction of the Court that the Provincial Government had reasonable grounds for being satisfied that it was necessary to detain Mr. Mohammad Shafi for one or the other of the two purposes specified in S. 3. In any case, it is contended that the least that the Provincial Government could do was to put in an affidavit controverting para by para the truth of the recitals appearing in the affidavit accompanying the petition.

[8] The question of onus in cases in which the good faith of the detaining authority is not

challenged came up for consideration before the House of Lords in the well-known case in (1942) A. C. 206.² In that case the appellant who was detained by order made by the respondent, Sir John Anderson as Home Secretary, under Regn. 18B, Defence (General) Regulations, 1939, claimed by his writ a declaration that his detention in Brixton prison was unlawful. Sir John Anderson admitted in his defence that he ordered the detention under the Regulations. The appellant thereupon applied for proof of the grounds on which Sir John had reasonable cause to believe the appellant to be of hostile associations and of the grounds upon which Sir John had reasonable cause to believe that by reason of such associations it was necessary to exercise control over the appellant. Master Mosley refused to make any order and that order was upheld by the Judge in Chambers who, however, gave leave to appeal to the Court of appeal. The Court held that the appellant was not entitled to any of the particulars he was claiming and the appeal was dismissed. On a further appeal to the House of Lords, their Lordships had occasion to construe the expression 'reasonable cause' appearing in Regn. 18B which is in the following terms :

"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it was necessary to exercise control over him, he may make an order against that person directing that he be detained."

[9] Lord Atkins held that whenever such words as "reasonable cause" are used either at common law or in a statute the Courts have considered that they give rise to a justiciable issue although the existence of reasonable cause must be tried by an objective test. According to him the Secretary of State must allege and prove facts which show the reasonableness of his belief. The other Lords, however, came to a contrary conclusion. They held that the existence of "reasonable cause" must be proved by a subjective test. According to them 'reasonable cause' was something which existed solely in the mind of the Secretary of State, that he alone could decide it and that it was not subject to challenge or judicial review unless it could be shown that he did not hold the opinion which he professed to hold. They accordingly expressed the view that the statement of the Secretary of State that he had a reasonable cause for his belief is conclusive. Their answer to the prayer for further information was that the particulars asked for by the appellant could be ordered only if the onus was on the Secretary of State to prove the various facts which justified the making of the order for detention. The onus of proving these matters was not on the Secretary of State and no order for particulars ought to be made. Where regula-

tions are made for the safety of the realm and the administrative plenary discretion is vested in a Secretary of State it is for him to decide whether he has reasonable cause to act accordingly. This is the leading case on the subject and *prima facie* the words "if satisfied" appearing in the Act of 1947 must be construed in the same manner as the words "reasonable cause" appearing in the Defence (General) Regulations 1939.

[10] Learned counsel for petitioner contends that the conditions in which the Secretary of State made his order in England are so completely different from the conditions in which the Provincial Government made its order in India that it is a mistake to hold that the principles enumerated by their Lordships for cases relating to the United Kingdom are applicable to cases arising in this country. Some of the differences to which my attention has been invited are as follows :

(a) The person who is primarily entrusted with important duties of making orders of detention in England is one of the principal Secretaries of State and a member of the Government answerable to Government for a proper discharge of his duties, while the person who is entrusted with similar duties in India is the Provincial Government or, in the absence of a ministry, the Governor of the province who is not responsible to any Legislature and who is not aided or advised by a council of ministers.

(b) That the Secretary of State is provided with one more advisory committee and has to report to Parliament at least once in every month as to the action taken by him and as to the number of cases in which he declined to follow the advice of the advisory committee. No such machinery has been devised in this province for safeguarding the interests of the public.

[10a] While I have no hesitation in holding that it is more difficult to deprive a subject of his liberty in England than it is in India, the basic considerations which prompted the House of Lords in coming to the conclusion that the existence of reasonable cause must be proved by a subjective test are as valid in this country as in any other part of the world. These considerations briefly are :

(a) That the authority making the order has access to exclusive sources of information ;

(b) that he is one of the high officers of State who by reason of his position is entitled to public confidence in his capacity and integrity ; and

(c) that, as pointed out by Lord Wright, there is no justiciable issue in cases of this kind but merely an executive act which is not open to legal review.

[10b] I am clearly of the opinion that if in response to a writ of habeas corpus the Provin-

cial Government produce an order of the nature that has been produced in this case, that is a complete answer to the writ unless the good faith of the Provincial Government is successfully impugned. As the Provincial Government has produced the order which was issued under S. 3 of the Act of 1947, it must be presumed that the fundamental requirements of law have been complied with and that the detention of Mr. Mohammad Shafi is not illegal.

[11] But the good faith of the Provincial Government has been challenged in the present case. The affidavit put in by the petitioner shows that although the Provincial Government says in the order that it was satisfied that Mr. Shafi should be detained, it was in fact not so satisfied and that the order was in fact passed with the collateral object of subserving private malice.

[12] The affidavit relates to three separate incidents which are said to have actuated the Provincial Government in ordering the detention of Mr. Shafi. The first is that Mr. Shafi was rude to the Home Secretary at an interview in which the publication of an article was discouraged. The second is that Mr. Shafi published the said article in the Dawn of 12th May although the Home Secretary had advised him not to do so. The third is that the order of detention was made by the Provincial Government on 12th May shortly after the article had been published in the Dawn of the same date. This article is said to have contained a scathing attack on the policy of Sir Evan Jenkins. His Excellency was not a party to the first of the two incidents to which a reference has been made, for these incidents had taken place between Mr. Shafi and the Home Secretary. There is not an iota of evidence on the file to justify the conclusion that the Home Secretary complained to the Governor against the conduct of Mr. Shafi. Assuming for the sake of argument that a complaint was made to the Governor I decline to believe that His Excellency who is one of the "high officers of State who by reason of his position is entitled to public confidence in his capacity and integrity" resorted to the dishonest expedient of clapping Mr. Shafi in prison although he was not satisfied that it was necessary to order his detention under S. 3 of the Statute. The only incident which could possibly have a bearing on the matters in controversy is the fact that the order was passed on the same day on which the article was published in the Dawn. It is a strange coincidence that the article should be published and the order made on one and the same day, but must this coincidence lead one irresistibly to the conclusion that the order has been made to gratify private malice? Now, in an action for malicious prosecution the plaintiff has the burden throughout

to establish that the circumstances of a prosecution were such that a Judge can see no reasonable or proper cause for instituting it. A similar burden appears to rest on the petitioner in this case. May it not be that quite independently of the article which appeared on 12th May the Governor was satisfied that it was necessary to arrest Mr. Shafi? May it not be that the very sentiments expressed in the article satisfied the Governor that Mr. Shafi could not be allowed to remain at large without danger to the public safety? It is impossible for me to speculate on the reasons which prompted the Governor to take the action which he did. The law has vested the discretion in him and he has chosen to exercise it. The law says that the Provincial Government should be satisfied and the Governor who is the Provincial Government in the S. 93 regime says that he is satisfied. The Governor's order is in my opinion sufficient *prima facie* proof that he has acted lawfully and that the detention of Mr. Shafi was not illegal. It has been held repeatedly that in the absence of proof to the contrary, credit should be given to public officers, who have acted *prima facie* within the limits of their authority for having done so with honesty and discretion: (1869) 4 Ex. 222³ at p. 226. The circumstances indicated in the affidavit are not, in my opinion, sufficient to rebut the presumption of good faith which has arisen. I am accordingly of the opinion that no case has been made out in the affidavit which necessitates the filing of a counter affidavit by the Crown.

[13] A counter affidavit has in fact been filed by the Home Secretary in this case. He states that Mr. Shafi was arrested and detained by the Provincial Government under S. 3 of the Act of 1947, for the said Government was satisfied that it was necessary to arrest and detain him with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order and the arrest and detention was not due to any other reason. I can see no reason for disbelieving the correctness of the statement appearing in this document. Indeed the document confirms me in the belief that Mr. Shafi is being detained according to process of law, that his detention is not for a collateral object and that the order of the Provincial Government was not passed in bad faith.

[14] The only other point which was raised was that there is no evidence on the file to show that the Governor had satisfied himself personally that it was necessary to order the arrest and detention of Mr. Shafi. Here again, the order must speak for itself. It says that the Provincial Government was satisfied and, in the absence of evidence to the contrary this recital must be presumed to be true. There can be no

doubt or ambiguity as to the person who constitutes the Provincial Government under the S. 93-administration. Under the present regime, the Governor is the Provincial Government and the Provincial Government is the Governor. I entertain no doubt whatsoever that the Governor satisfied himself before making the order the validity of which is now being contested.

[15] As the petitioner has failed to establish *mala fides* in this case, the only order that I can make is that the habeas corpus must be refused. I would order accordingly.

[16] I would like to say a few words in conclusion. The pressing necessities of the moment have placed a most formidable weapon in the hands of the Government, for, the powers conferred on the Crown by the Punjab Public Safety Act, 1947, are so wide and extensive that almost any kind of official action can be justified. Section 3 empowers the Provincial Government to arrest a suspected person if the Provincial Government (not the Court) is satisfied that his arrest is necessary. In the absence of very strong and convincing evidence of *mala fides* how is it possible ever to show that the Provincial Government was not satisfied? It is not for this Court, but for the Provincial Government to consider whether there is evidence which satisfies it that a person ought or ought not to be arrested or detained. As pointed out in (1942) 1 ALL. E. R. 373⁴ the only matter into which the Court can inquire are "facts relevant to the legality of the detention, e. g., the *bona fides* of the Secretary of State, the genuineness of the detention order and the identity of the applicant with the person referred to in the order". It is the duty of the executive to make certain that even in these difficult times emergency measures do not exceed the necessities of the situation.

V.R.

Order accordingly.

A. I. R. (35) 1948 Lahore 92 [C. N. 33.]

CORNELIUS AND FALSHAW JJ.

Emperor v. Kishori Lal — Accused — Respondent.

Criminal Appeal No. 441 of 1946, Decided on 15-4-1947, from order of Sessions Judge, Ludhiana, D/-13-2-1946.

Cotton Cloth and Yarn (Control) Order (1943), Cl. 23 — Sanction not mentioning nature of offence — Sanction is defective.

The sanction for a prosecution for the contravention of any of the provisions of the Cotton Cloth and Yarn (Control) Order should either contain some specific details regarding the offence for which the prosecution is sanctioned, or at any rate, if these details are not given in the actual sanction, there should be placed on the file copies of the correspondence by which the sanction was procured which would relate the sanction to the offence with which the accused is charged. Where

neither of these things is done, the sanction is defective, and the accused should be acquitted : 31 A. I. R. 1944 F. C. 25, *Rel. on.*; 34 A. I. R. 1947 Bom. 151, *Ref.*

[Para 7]

Cases referred:—

1. ('45) 32 A. I. R. 1945 All. 214 : I. L. R. (1945) All. 617 : 46 Cr. L. J. 678 : 220 I.C. 324, *Bhikkha Mal v. Emperor*.
2. ('45) 32 A. I. R. 1945 All. 90 : I. L. R. (1945) All. 540 : 219 I. C. 87 : 46 Cr. L. J. 472, *Harish Chandra v. Emperor*.
3. ('44) 31 A. I. R. 1944 F. C. 25 : I. L. R. (1944) Kar. F. C. 54 : 1944-6 F. C. R. 143 : 215 I. C. 48 : 46 Cr. L. J. 332 (F. C.), *Raghubar Singh v. Emperor*.
4. ('46) 48 Bom. L. R. 754 : 34 A.I.R. 1947 Bom. 151, *Emperor v. J. C. D'Souza*.

Kartar Singh Chawla, A. L. R. — for the Crown.

Tek Chand — for Respondent.

Falshaw J. — The respondent in this case Kishori Lal was convicted under R. 81 (4), Defence of India Rules for a contravention of cl. 12 (6), Cotton Cloth and Yarn (Control) Order by a Magistrate of Ludhiana, but was acquitted by the Sessions Judge in appeal, and the Government has appealed against his acquittal.

[2] Briefly, the prosecution case is that on 19-1-1945, the accused, who is the proprietor of a cloth shop, refused to sell muslin and long cloth to two customers sent in succession by an Inspector of the Civil Supplies Department to his shop; the accused only showing to the customers some long cloth of inferior quality and denying that he had any muslin at all in stock or any better long cloth. His shop was then searched and 20 pieces of cloth including several kinds of muslin and some superior long cloth were recovered. His defence was that the customers had asked for muslin and long cloth of foreign manufacture of which he actually had none in stock, but this defence was rejected by the trial Court. The learned Sessions Judge did not give any finding as to the facts of the case but acquitted the respondent on the ground that there was no proper sanction of the Punjab Government for his prosecution as required by S. 23, Cotton Cloth and Yarn (Control) Order which reads:

"No prosecution for the contravention of any of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government."

[3] The sanction on the basis of which the present case was instituted against the respondent is dated 19-2-1945 and reads:

"The Governor of the Punjab is pleased to accord sanction under Cl. 23, Cotton Cloth and Yarn (Control) Order, 1943, for the prosecution of Kishori Lal Proprietor Messrs Kishori Lal Gurbachan Dass Khanna Cloth Dealers, Ludhiana district for the alleged contravention of the provisions of the said Order."

and it bears the signature of Mr. I. E. Jones, Secretary to Government, Punjab, Civil Supplies Department. This sanction was found to be invalid by the learned Sessions Judge on the ground that it did not specify the particular offence with which the

accused was to be charged, and he relied on the decision reported as A. I. R. 1945 ALL. 214.¹ This also relates to a case under the Cotton Cloth and Yarn (Control) Order in which the prosecution had, in the first place, been instituted before any sanction was obtained from the Provincial Government, and the sanction, when it was obtained, was defective in that the offence for which the accused were originally prosecuted was that of having unopened bales of untex-marked cloth after 31-8-1943, whereas the sanction which was granted related to the offence of holding unopened bales of untex-marked cloth after 31-10-1943. Malik J., held that the sanction could not validate the trial on the double ground that it was not obtained before the case was instituted and that it was not for the prosecution of the particular offence with which the accused were charged, and he cited a previous decision of his own reported as A. I. R. 1945 ALL. 90,² in which he had held that the sanction goes to the root of the jurisdiction of the Magistrate. In view of the clearness of the language of S. 23 of the Order, he held that it was not open to the Court to say that the absence of a valid sanction was a mere irregularity which did not vitiate the proceedings.

[4] In the present case, it is not in dispute that the sanction was obtained before the institution of proceedings and the facts are not altogether similar to those in A. I. R. 1945 ALL. 214,¹ since the words of the sanction are merely vague and it cannot be said that the sanction was for the prosecution of the respondent for a different offence from that with which he was actually charged. Some further authorities have, however, been cited on behalf of the respondent. The first of these is A. I. R. 1944 F. C. 25.³ This relates to a prosecution under S. 104, Insurance Act which was instituted against certain persons connected with an insurance company by the Public Prosecutor of Lucknow on the basis of a sanction granted by the Advocate-General under S. 107 of the Act, according to which unless proceedings are instituted by the Superintendent of insurance himself, no such prosecution can be instituted by any person unless he has obtained the sanction of the Advocate-General of the Province. The sanction of the Advocate-General under S. 107 was given in respect of matters arising out of the first valuation report of the company as at 15-5-1939, proceedings in respect of which might have been brought under the Insurance Act of 1912, but the charges on which the convictions were obtained were all in respect of the report and balance-sheet of 31-12-1939. The relevant portion of the sanction of the Advocate-General was in the following terms:

"In exercise of the powers conferred by S. 107, Insurance Act (1938), I hereby sanction the institution of

proceedings (prosecution) by the Government against (the persons named) for offences committed against Insurance Law."

The following are the relevant portions of the judgment:

"It is clear therefore that before the sanction is given the Advocate-General must have proposals before him for the initiation by some person of particular proceedings of a defined nature under the Act against one or more of the specified persons, and he must sanction the initiation of those proceedings by that person, and that if proceedings are initiated by some one other than the person to whom the sanction has been given, or if proceedings substantially different from those sanctioned are in fact initiated, the provisions of the section are not complied with and there will be no jurisdiction for a Court to entertain the proceedings."

"Whilst it is desirable that the sanction should be given in writing and should on the face of it indicate reasonably clearly by statement or references to other documents the necessary matters above set out the section does not require any particular form of sanction or even that it should be always in writing. What is necessary is that if challenged by a defendant or accused person the plaintiff or prosecutor should be able to establish to the satisfaction of the Court that the requisites of the sections as set out above have been complied with in respect of the sanction on which he relies, so that the Court can be satisfied that it has jurisdiction to entertain the particular proceedings before it."

"A valid previous sanction under S. 107 is essential to the jurisdiction of the Courts to entertain proceedings in respect of offences under the Act. Section 107 is intended to protect insurers, directors, managers and other persons indicated from the initiation of improper proceedings. Unless the protection is to be worthless, they must, if necessary, be entitled to challenge the sanction of the Advocate-General as not having been given to the person who initiates the proceedings or to the particular proceedings initiated against them. When objection is pressed to the validity of the sanction, it is the duty of the prosecution to establish that proper sanction had been obtained to the proceedings before the Court, so as to give the Court jurisdiction."

[5] The next authority is reported as 48 Bom. L. R. 754.⁴ This is a decision by a Division Bench consisting of Sir Leonard Stone, C. J. and Bavdekar J., in a Government appeal against the acquittal of the respondent who had been convicted under R. 81 (4), Defence of India Rules for contraventions of Cls. 14 (1) (b) and 15-A, Cotton Cloth and Yarn (Control) Order. In that case the sanction, which is in the form of a resolution of the Government was in these terms:

"Government is pleased to accord sanction under Cl. 23, Cotton Cloth and Yarn (Control) Order 1943, to the prosecution of . . . for breach of the provisions of Cl. 15-A and new Cl. 14 (1) (b) of the said Order."

The appeal was dismissed on the ground that the resolution did not specify any particular act of contravention in respect of which a breach of the order was alleged, and the onus to show that the requisite sanction had been given must obviously rest with the prosecution and as the prosecution had only adduced in evidence the resolution and nothing more, Cl. 23 had not been sufficiently complied with.

[6] In the present case, it is clear that the sanction dated 19-2-1945 must have been granted in response to some request for the sanction of the prosecution of the respondent in the form of a letter addressed to the Government setting out the facts of the case, and I do not think that there is any doubt that the sanction would have been a sufficient one if the prosecution had also put in a copy of the letter addressed to the Government and the sanction had contained some reference to this letter. But as it is, the sanction contains no reference at all to the nature of the offence alleged to have been committed by the respondent and no copy of the letter reporting the case to the Government has been placed on the file. It may be noted that in the Bombay case referred to above, the resolution according sanction to the prosecution of the respondent actually mentioned the clauses of the Cotton Cloth and Yarn (Control) Order which he was alleged to have contravened, but even these details are not given in the sanction (Ex. P. H.), and there is nothing to show that the sanction does not relate to some other offence against the provisions of the Order committed by the respondent on some other date. It would thus appear that the case would fall within the scope of the remarks in the Federal Court judgment in the second and third passages cited above to the effect that if the sanction is challenged the material should be present on the file to show to the satisfaction of the Court that the requisites of the section have been complied with in respect of the sanction on which reliance is placed, so that the Court can be satisfied that it has jurisdiction to entertain the particular proceedings before it.

[7] In the circumstances, I consider that the sanction for a prosecution of this kind should either contain some specific details regarding the offence for which the prosecution is sanctioned, or that at any rate, if these details are not given in the actual sanction, there should be placed on the file copies of the correspondence by which the sanction was procured which would relate the sanction to the offence with which the accused is charged, and I thus consider that the sanction in the present case was defective and the accused was rightly acquitted and would dismiss the appeal.

Cornelius J. — I agree.

D.S.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 94 [C. N. 34.]

CORNELIUS AND FALSHAW JJ.

Mt. Shiamun — Plaintiff — Appellant v. Mt. Jasodhan and others — Defendants — Respondents.

Second Appeal No. 723 of 1945, Decided on 9-6-1947, against decree of Dist. Judge, Hoshiarpur Kangra, D/-19-12-1944.

(a) Custom (Punjab)—Rajputs of Kangra District — Right of widowed daughter without children to inherit.

Among Rajputs of Kangra district where a daughter is either married or a widow and has either no children or no male child she cannot inherit to her father. The exclusion of such a daughter is not restricted to a case where the competing claimants are collaterals but also applies to case where the rival claimants are daughter with male children. [Para 2]

(b) Custom—Custom excluding daughter without children from inheritance whether against public policy.

A custom excluding a daughter without a male issue from inheritance cannot be said to be against justice, equity and good conscience. [Para 2]

(c) Custom (Punjab) — Ancestral property — Daughters—Property inherited from father.

Property inherited by daughters from father is ancestral property to which customary law applies. [Para 3]

Case referred :—

1. (35) 22 A. I. R. 1935 Lah. 985 : 166 I. C. 987, *Mt. Chinto v. Thebu.*

D. K. Mahajan and K. C. Soni — for Appellant.

S. Charan Singh — for Respondents.

Cornelius J. — The parties to this second appeal are the descendants of one Mutasaddi, a Rajput of the Kangra District. The suit was brought by Mt. Shiamun who was the daughter of Mutasaddi by his wife Mt. Sukhdevi. Mt. Shiamun was a widow at the time of the suit and had a daughter, but no son. The defendants Mt. Jasodhan and Mt. Daromti are daughters of Mutasaddi by another wife named Mt. Devko, and each of these defendants has a son. Defendant 3 is a minor boy named Saran son of one Lachhman whose mother Mt. Bholi was a sister of Mt. Jasodhan and Mt. Daromti. Mutasaddi was predeceased by Mt. Sukhdevi, and when he died his widow Mt. Devko took the usual widow's life estate. Upon her death in 1942, the estate was mutated in the names of the three defendants, and in 1943, Mt. Shiamun sued them for possession of the entire estate on the grounds that she had served Mt. Devko up to the time of her death and under the Hindu law, being a widowed daughter who was indigent she was entitled to the whole estate. The main pleas taken by the defendants were that the parties were governed by custom, and that under custom, their rights were superior to those of Mt. Shiamun who had no male child. Two issues were framed namely whether the parties were

governed by custom in matters of inheritance, and if so, what that custom was and secondly whether the plaintiff was entitled to the whole of any share of the property. The trial Court decided that the parties being Rajputs by caste were governed by custom as laid down in the *riwaj-i-am* of the Kangra district prepared at the settlement of 1914-1918, of which questions and answers 49 and 51 were relevant. Clause (iii) in the answer to question 51 excluded any right in the plaintiff to inherit to her father's estate. It was further held that there was no proof that the plaintiff had rendered any more service to Mt. Devko than had been rendered by the defendants, or that she was in any more needy circumstances than they were. Accordingly, it was held that the plaintiff was not entitled to take advantage of the provisions of Hindu law on the basis of indigence and service, and as under custom she was not entitled to any share in the estate of her father, her suit was dismissed but the parties were left to bear their own costs. An appeal was taken before the learned District Judge, but was dismissed. The findings of the trial Court were confirmed by the learned District Judge. The parties were again left to bear their own costs.

[2] Learned counsel for the appellant Mt. Shiamun has invited our attention to questions 49 and 51 in the *riwaj-i-am* of the Kangra District. Question 49 is stated in the form of five separate questions, which are designed to obtain a comprehensive statement of the circumstances in which the inheritance under custom devolves upon daughters, and in particular how the rights of daughters stand in relation to sons and collaterals of the deceased male holder. The answer as set out in the *riwaj-i-am* is somewhat confused, and may be set out more logically as below: (a) Generally, in the absence of a son or a widow daughters succeed till marriage; (b) except as provided in the next three sub-clauses married daughters are allowed to succeed if there be no collateral of the deceased person within seven generations; (c) among Suds and Mahajans of Palanpur tahsil, married daughters are allowed to succeed if there be no collateral within five generations; (d) among Gaccis, Kanets and Gossins, married daughters never succeed; and (e) in Jagir villages, daughters are not allowed to succeed at all. In the present case, there is no evidence to show whether there are any collaterals within seven generations who could exclude any of the parties and since the suit of the plaintiff might have been defeated on this score, the fact that the plea was not raised by the defendants would appear to indicate that there are no such collaterals in existence, and, therefore, following the answer to question 49 of the Kangra *riwaj* the estate of Mutsaddi may

devolve upon his daughters after the death of his widow notwithstanding that they are married. Question and answer 51, however, contain a provision which seems to apply directly to the case of the plaintiff. Question 51 is divided into five different questions, each separately set out in the form of a sub-question. The first sub-question relates to the right of a daughter to be maintained out of her deceased father's estate. The second deals with the question whether marriage or residence in a strange village affects the right of a daughter either to inheritance or to be maintained. The third and the fifth sub-questions seem to be identical; they raise the question whether daughter who is married or a widow and who is either childless or has no male issue, can inherit her father's estate. The fourth sub-question deals with the case of the right of a married daughter living with her father till his death to inherit to him. The answers to sub-questions (iii) and (v) which are relevant to the present case are very clear. They are that a married daughter or a widowed daughter having no child or only a daughter cannot inherit her father's estate and that "daughters do not inherit" under the circumstances mentioned in sub-question (v). To the answer, a remark by the Settlement Officer who compiled the *riwaj-i-am* is appended, which runs as follows:

"There is a widespread feeling in the district against the succession of daughters to ancestral property, the only successions allowed being maintenance till marriage."

Attention was also invited to the abstract from the earlier *riwaj-i-am* of 1863 which is reproduced at p. 173 of the volume of Customary Law of the Kangra District compiled at the 1914-1918 Settlement and under question 10 which is on the point whether a daughter married or unmarried succeeds if there be no male issue, the answer was that married daughter never succeeds and that in the case of all tribes except Gaddis of the snow hills, an unmarried daughter was allowed to hold possession of the estate with the same powers as a widow until her marriage when the property would revert to the collaterals; the Gaddis of the snow hills allowed the property to go to the collaterals, but made them responsible for arranging the daughter's marriage. To this question, a note was appended by the compiler of the later *riwaj-i-am* which runs as follows:

"See question 51. Unmarried daughters are allowed only till marriage, while married daughters are not allowed. In many cases self-acquired property has gone to a married daughter."

In addition to these extracts from the 1868 and 1914-18 *riwaj-i-am* Mr. D. K. Mahajan invited our attention to a number of other questions and answers in the latter *riwaj* as well as in the

riwajs of the adjoining districts of Hoshiarpur and Gurdaspur, but so far as I can see, nothing in any other answer except those mentioned above is relevant to the present discussion. Mention may, however, be made of question 53 in the Kangra riwaj which is addressed to the problem of succession to daughters and the answer to which states that after daughters their sons succeed and in the absence of sons, in the case of certain tribes the daughter's husband's kindred succeed, and in the case of others, her father's collaterals succeed, and the answer ends with the following remarks:

"As succession of daughters is not very common there seems to be no well-defined custom on this point."

Mr. Mahajan attempted to use this remark as indicating that everything contained in the riwaj relating to the succession of daughters should be regarded as uncertain and conjectural, but it is clear that the remark is confined to the succession to daughters and has nothing to do with succession by daughters to their fathers' estate on which the custom is set out in questions 49 and 51 with a high degree of clarity. It was argued that question 51 was really addressed to the problem of maintenance, and matters relating to inheritance were allowed to creep in incidentally and irregularly and, therefore, statements in the answer relating to the right of inheritance should not be interpreted exclusively with reference to the terms in which they were expressed, but in relation to the competing rights of collaterals. It was also urged that question 51 was a composite and misleading question which had not elicited a clear and reliable statement of the usage of the people on the points involved. The criticism directed towards this question does not appear to me to be well-founded. In fact, while it is true that matters relating to both maintenance and inheritance are covered by the question, it is also clear that these matters have been analysed with some degree of care and the particular cases upon which the peoples' usage was to be ascertained were separately put in the form of well-expressed questions. On the particular point arising in this case, there were two sub-questions slightly differing in form, but precisely the same in content and to each of them the answer given was the same namely that where a daughter was either married or a widow and had either no children or no male child, she could not inherit to her father. I cannot see anything in the form either of the question or of the answer on this point which might lead to the inference that the exclusion of a daughter in the circumstances mentioned was to be restricted to a case where the competing claimants were collaterals, and was not intended to apply in a

case where daughters with male children, who were not disqualified by anything contained in the answer to question 51, and on the other hand, were entitled to succeed in the terms of the answer to question 49, were the rival claimants. The answer to sub-question (iii) of question 51 lays down a disqualification for inheritance by a daughter, and it is clear that the plaintiff suffers from this disqualification for which reason since it is clear that custom applies, her suit was bound to fail. Mr. D. K. Mahajan contended that if this was the case, the custom in question should be regarded as contrary to justice, equity and good conscience, and the Court should decline to follow it. It does not appear that this plea was raised at any earlier stage of the case and otherwise too, I am of the opinion that it is not well-founded, for as pointed out by the learned Senior Subordinate Judge who tried the case, even according to the Dayabhag school of Hindu law daughters who are widows without male issue are not permitted to inherit in any circumstances. The custom undoubtedly places a daughter at a disadvantage compared with her sisters if she, for no fault of her own happens to have no male child, but in matters of inheritance, the question of male issue has great importance under all known systems of law and it is, in my opinion, too late in the day to appeal to "justice, equity and good conscience" for the purpose of nullifying the advantage carried in these respects by the presence of male issue.

[3] Mr. D. K. Mahajan cited a single Bench decision of this Court relating to the Kangra riwaj published as A. I. R. 1935 Lah. 985¹ where question and answer 50 in the riwaj came under consideration. As the answer stood, it gave the impression that in relation to the rights of daughters to inherit, the riwaj made no distinction between ancestral and self-acquired property, but it was held on the basis of a note at p. 98 of the riwaj under question 49 (which was to the effect that a daughter's right to the self-acquired property of her father had been placed beyond dispute by judicial decision) and of a statement in the latest gazetteer of the district at p. 143 that daughters possess a preferential right in relation to self-acquired property as against their fathers' collaterals. Mr. Mahajan argued that the note at p. 177 of the riwaj to which reference has been made above should be read in a similar way with the answer to sub-question (iii) of question 51, but the argument is unsound, for the note goes strongly against the right of married daughters to succeed at all, and if applied as it is expressed would have the effect of nullifying the answer to question 49, in relation to the rights of married daughters altogether.

The abstracts from the riwaj which have been cited above indicate that the Customary law of the Kangra District tends strongly against allowing daughters to succeed, and it is, therefore, only right that the provisions of the riwaj conferring rights of inheritance upon daughters should be strictly construed. Consequently, where the recorded riwaj is perfectly clear that in specified circumstances, i. e., where the daughter is married or a widow and is either childless or has no male child, she has no right to inherit to her father, there need not be any hesitation in applying this custom strictly. The presumption of accuracy carried by this riwaj stands, for admittedly there is no evidence which can be set up against it.

[4] The point was next taken that there is no proof on the record that the property in suit is ancestral, since there is no presumption that agricultural property is ancestral; and since it has been held that as a general rule, provisions of the Customary law are confined in their operation to ancestral property in the absence of expression to the contrary, it should be held that question and answer 51 apply only to ancestral property, and there being no proof that the suit property is ancestral, that Mt. Shiamun is not debarred from inheriting to her father. This question was also never raised at any earlier stage and on other grounds also, the contention appears to be devoid of substance, for here the contest is not between a daughter and collaterals or other persons, in relation to whom it is necessary to search in the pedigree table for a common ancestor. Here the parties are descended directly from the last male-holder namely, Mutsaddi. It is well-settled that as regards sons, ancestral property means property inherited from a direct male lineal ancestor, e. g., the father, and it seems to me that it makes no material difference that in this case the question lies as between daughters in relation to property left by their father, and therefore that such property should be held to be for the purposes of this case ancestral. Consequently, the custom as stated in the answer to question 51 would appear to apply with full force.

[5] In this view of the matter, it appears to me immaterial whether Mt. Shiamun rendered services to Mt. Devko or is in needy circumstances. There is ground for thinking that she is not materially worse off than her sisters having only a daughter who also is widowed. For the reasons given above, I would dismiss this appeal and as it appears to me that the case had been thoroughly examined and properly decided by each of the Courts below, I would allow the respondents their costs in this Court.

Falshaw J.—I agree.

G.B.

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Appeal dismissed.

A. I. R. (35) 1948 Lahore 97 [C. N. 35.]

TEJA SINGH J.

Ragzan Chhodop — Petitioner v. Emperor.

Criminal Misc. No. 1680 of 1946, Decided on 3-2-1947.

(a) Criminal P. C. (1898), S. 543 — Witness should not be appointed his own interpreter.

The whole scheme of the criminal procedure, so far as it relates to the trial of cases, is based upon the salutary principle that before a person can be convicted for an offence, the evidence against him should be examined in his presence and he should be given opportunity to cross-examine the witnesses, to put forward his own version and to produce his own evidence. When an accused person does not understand the language of the Court, the services of an interpreter should be placed at his disposal so that he may know what the witnesses state and be in a position to suggest questions for cross-examination. By the very nature of things, the interpreter must be a person other than the witness whose evidence is to be interpreted, otherwise, the procedure of appointing an interpreter would be nothing but a farce. To allow a witness to interpret his own evidence is to place the accused entirely at his mercy, because in such case there can possibly be no guarantee that he would faithfully tell the accused what he would state before the Court and if the accused put any questions to him by way of cross-examination he would reproduce them faithfully in the Court language: 13 A. I. R. 1926 Cal. 922, *Rel. on.* [Para 2]

Annotation:—('46-Com.) Cr. P. C., S. 543, N. 2.

(b) Criminal P. C. (1898), S. 526 — Grounds — Accused examined on three occasions—Examination on one occasion for filling up gaps in prosecution evidence—Prosecution witness appointed his own interpreter to interpret his own evidence to accused—Case held fit for transfer. [Para 3]

Annotation:—('46-Com.) Cr. P. C., S. 526, N. 5.

Case referred:—

1. ('26) 13 A. I. R. 1926 Cal. 922 : 53 Cal. 659 : 65 I. C. 469, *Ah Sai v. Emperor.*

Karam Chand Nayar — for Petitioner.

Order.—This is an application for the transfer of a case pending in the Court of the Additional District Magistrate, Dharamsala. One of the points urged on behalf of the petitioner is that he does not know the language of the Court and the Magistrate recorded the statement of Pandit Paras Nath, one of the prosecution witnesses, once without the help of an interpreter and on two occasions allowed Paras Nath himself to interpret his own evidence to the petitioner. On turning to the record, I find that though the statements made by other prosecution witnesses were recorded with the help of an interpreter who was properly sworn in, Pandit Paras Nath's statement was taken on 22-11-1946 in the absence of the interpreter. It appears that the Magistrate was aware of the fact that the petitioner did not understand the language in which Pandit Paras Nath was going to give evidence, but taking advantage of the fact that Paras Nath knew Spithi language, which could be understood by the petitioner, allowed Paras Nath to interpret his evidence to the petitioner. The case was then

adjourned to 9-12-1946. On that day the petitioner's counsel represented to the Magistrate that the procedure adopted by him for recording Pandit Paras Nath's statement on 22nd November was illegal. The Magistrate accepted this contention and holding that Pandit Paras Nath's statement must be taken again he summoned him to appear before him on 14th December. On that day, when Pandit Paras Nath appeared, it so happened that the interpreter was again absent. At the request of the public prosecutor, the Magistrate once more appointed Pandit Paras Nath to interpret his own evidence to the petitioner and proceeded to record his statement. His order on the point reads as follows :

"Defence counsel objects to Pt. Paras Nath being appointed his own interpreter The objection of the defence counsel does not appear to be reasonable in view of the circumstances pointed out by the public prosecutor. There is nothing in the law to stop Pt. Paras Nath from acting as his own interpreter when he knows both the languages. All that is required is that the evidence should be interpreted to the accused in the language which he understands which in this case happens to be Spithi. I, therefore, order Pandit Paras Nath to interpret his own evidence on oath to the accused in Spithi language. This is essential to avoid unnecessary delay in the disposal of the case."

[2] Apart from the fact that in allowing Pandit Paras Nath to give his evidence and at the same time to interpret it to the petitioner, the Magistrate ignored his own order of 9th December 1946, he set at naught the fundamental principles underlying criminal jurisprudence and procedure. The whole scheme of the criminal procedure, so far as it relates to the trial of cases, is based upon the salutary principle that before a person can be convicted for an offence, the evidence against him should be examined in his presence and he should be given opportunity to cross-examine the witnesses, to put forward his own version and to produce his own evidence. When an accused person does not understand the language of the Court, it is laid down that the services of an interpreter should be placed at his disposal so that he may know what the witnesses state and be in a position to suggest questions for cross-examination. By the very nature of things, the interpreter must be a person other than the witness whose evidence is to be interpreted, otherwise, the procedure of appointing an interpreter would be nothing but a farce. The learned Magistrate has observed that there was nothing in law to stop Pandit Paras Nath from acting as his own interpreter when he knew both the languages, i. e., the language in which he was to give evidence and the language of the accused. But he did not realize that to allow Pandit Paras Nath to interpret his own evidence was to place the accused entirely at his mercy, because there could possibly be no

guarantee that he would faithfully tell the accused what he would state before the Court and if the accused put any questions to him by way of cross-examination he would reproduce them faithfully in the court language. In one of his orders the Magistrate also observed that Pandit Paras Nath's evidence was formal, but this does not appear to me to be correct, because it is clear from the record that he was the person who made the first information report and later on, conducted the preliminary inquiry under the orders of the Deputy Commissioner before the police appeared on the scene. In addition, he deposed to the alleged extrajudicial confession of the accused.

[3] The learned counsel for the petitioner cited before me A. I. R. 1926 Cal. 922¹ in which the interpreter, who was asked to interpret the evidence of the prosecution witnesses to the accused person, was not himself a witness at the trial, but had taken part in the police investigation and had given evidence in the Committing Magistrate's Court. The learned Judges condemned the practice of allowing even a person of that kind to act as an interpreter and held that the evidence recorded with the help of such an interpreter could not be used for the conviction of the accused person. This is what they observed :

"We regret to have to say that the procedure which was adopted by the learned Sessions Judge has had the effect of placing the accused more or less at the mercy of the interpreter Lewis. It was a procedure which was absurd from the very outset and opposed to elementary ideas of justice. That a witness who had taken an active part during the police investigation, who had given evidence in the Committing Magistrate's Court on behalf of the prosecution, and who was found to be ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man who was charged with very serious offences under Ss. 302 and 304, Penal Code, should have been chosen to act as an interpreter in this case, is a procedure which has only to be stated to call forth our severe condemnation. We trust that a thing like this will never happen again."

It was then urged by the petitioner's counsel that the Magistrate was taking extraordinary interest in the case and appeared to be keen in convicting him and in support of his contention, he drew my attention to the fact that the Magistrate had examined Paras Nath three times and on one occasion he took his statement in order to fill up gaps in the prosecution case, which were pointed out in the arguments of the petitioner's counsel. The Magistrate in his report has explained why he had to examine Paras Nath more than once. But for the illegal procedure adopted by the Magistrate in asking Paras Nath to interpret his own evidence, I would have considered the explanation plausible but as it is, I cannot help thinking that even if the Magistrate's action was not the outcome of bias

against the petitioner, taken together with the illegality committed by him, it is sufficient to raise reasonable apprehension in the petitioner's mind that he will not get impartial justice at the hands of the Magistrate.

[4] Accordingly, the petition is accepted, the case is withdrawn from the Court of the Additional District Magistrate and it is sent to the District Magistrate with the direction, that he should make it over to some other Magistrate competent to try it. The petitioner's counsel has stated before me that he will not claim *de novo* trial and the case might be decided on the evidence that is on record. This, however, does not cover the statements of Paras Nath which were made on 22nd November and 14-12-1946, and which do not constitute legal evidence in the case. The petitioner's counsel has been directed to cause his client to appear in the Court of the District Magistrate, Dharamsala, on 3-3-1947.

R.G.D.

Petition accepted.

* **A. I. R. (35) 1948 Lahore 99 [C. N. 36.]**

ABDUR RAHMAN AND MAHAJAN JJ.

Rahmat and others — Plaintiffs — Appellants v. Sardara and others — Defendants — Respondents.

Second Appeal No. 620 of 1945, Decided on 7-5-1947, from decree of Dist. Judge, Gujranwala, D/- 28-10-1944.

*Limitation Act (1908), Art. 144—Female heir of a Mahomedan making gift to third person — Gift challenged by reversioner as not binding on reversionary body — Reversioner in compromise with donee getting half of gifted property—Suit by other reversioners claiming share in property got under compromise.

On the death of one S, a Mahomedan, his daughter F succeeded to the land left by him. In 1926 F made a gift of a portion of the land in favour of one M. One A brought a suit in 1932 to challenge the gift on the ground that it was not binding on the reversionary heirs of S as being invalid under custom. In 1933, however, A entered into a compromise with M and under the compromise decree took possession of half the land gifted to M. F died in 1940. In 1942 one R and others brought a suit claiming certain share in half the land that came to A under the compromise as reversionary heirs of S:

Held that (1) S. 8, Punjab Limitation (Custom) Act, 1 [I] of 1920 did not apply to the case as the decree in A's suit did not declare that gift by F in favour of M was invalid under custom but declared A as owner and in possession of half of the land that had come by gift to M. [Para 7]

(2) A's suit actually and constructively was a representative suit on behalf of all the reversionary heirs of S: 2 A. I. R 1915 P. C. 124, *Rel. on.* [Para 9]

(3) If A acted honestly in the matter of the compromise his possession under the compromise was on behalf of the plaintiffs also and they were entitled to recover their share in the property taken under the compromise. [Para 9]

(4) If, however, A acted dishonestly in the matter of the compromise and entered into possession as an

owner in his independent right, his possession was adverse to plaintiffs but A had not perfected his title by prescription on the date of the plaintiff's suit and he could not also tack on the possession of M to his own. Thus neither M nor A acquired any title in the disputed property adversely to the rights of the reversionary heirs of S. Plaintiffs' cause of action accrued on the death of F in 1940 and they were entitled to claim a share in the property. [Para 10]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144 N. 35 and 39.

Case referred:—

1. ('15) 38 Mad. 406: 2 A. I. R. 1915 P. C. 124: 42 I. A. 125: 29 I. C. 298 (P. C.), Venkatanarayana Pillai v. Subbammal.

Bashir Ahmad — for Appellants.

B. Z. Naikans — for Respondents.

Mahajan J.—This is a second appeal from a decision of the District Judge of Gujranwala in a suit for possession of certain land situate at village Kotli Moharan, Tehsil Gujranwala.

[2] The facts giving rise to this litigation are these. One Sadar Din was the owner of 286 kanals 3 marlas of land. On his death it was mutated to his widow Mt. Umar Bibi. She remarried and on her remarriage the property was mutated in the name of Mt. Fatima Bibi, the only surviving daughter of Sadar Din. On 7-1-1926 Mt. Fatima Bibi made a gift of 113 kanals 5 marlas out of the land inherited by her in favour of one Faqir Mohammad. This deed of gift was registered on 7-4-1926. Ahmad Din father of Abdul Haq, defendant 28 in this case, brought a suit to challenge the gift on the ground that it was invalid under custom and was not binding on the reversionary body. The suit was instituted on 7-4-1932, i. e., on the last day of limitation prescribed by law for the institution of a suit of this character. In the plaint it was alleged that the act of Mt. Fatima Bibi was to the prejudice of the rights of the plaintiff and other collaterals of Sadar Din and that the alienation had been made without consideration and legal necessity. It was also said in the plaint that this alienation could not in any way bind the reversionary rights of the plaintiff and all other collaterals of Sadar Din. On 14-6-1933 Ahmed Din entered into a compromise with Faqir Mohammad and under the compromise he took the donee's possession of half of the land that had been gifted by Mt. Fatima Bibi to Faqir Mohammad. He paid a sum of Rs. 175 to Faqir Mohammad before obtaining possession of half of the property gifted by Mt. Fatima Bibi. He also undertook to discharge any mortgages that existed on this property. The other half of the property gifted was declared to be the absolute ownership of the donee. In accordance with the terms of this compromise a decree was passed by the Subordinate Judge in the following terms:

"A compromise has been arrived at between the parties. According to the terms of the compromise a declaratory decree is granted to the plaintiff in respect of half the property in suit. The suit regarding the other half is dismissed. Parties will bear their own costs."

The Court gave sanction on behalf of the minor for making the compromise. The result of this compromise was that Ahmad Din entered into possession of half share of the property that had been gifted to Faqir Mohammad by Mt. Fatima Bibi. After the compromise Ahmad Din, the plaintiff in the declaratory suit, transferred the property that he obtained under the compromise in favour of his son Abdul Haq, defendant 28. Since then Abdul Haq has been in possession of this property.

[3] It appears that Mt. Fatima Bibi also effected a number of mortgages in respect of the property inherited by her from her father but in the present appeal we are not concerned with those mortgages and a detailed mention of them is not, therefore, necessary.

[4] On 22-1-1942 Rahmat and others brought the suit out of which this second appeal arises for possession of 341/480 share of the land that at one time was held by Sadar Din. They alleged that they along with defendants 1 to 26 were collaterals of Sadar Din, that Mt. Fatima Bibi was in possession of the estate of her father as an heir and that she died on 10-10-1940 without leaving any heirs and thus the plaintiffs and defendants 1 to 26 were entitled to secure the possession of the land in suit which was 275 kanals 9 marlas in area. It appears that the original area in possession of Sadar Din had been reduced to 275 kanals 9 marlas owing to an acquisition of a small piece of land by Government. It was further contended by the plaintiffs that clandestinely the land in suit had been mutated in favour of defendants 2, 19 and 26, that that mutation was ineffective as against the plaintiffs and other heirs and that Ismail, Ahmad and Abdul Haq were refusing to give possession to the plaintiffs in proportion to their shares.

[5] The suit was contested mainly by defendants 2, 19, 26 and 29 who all filed a joint written statement. It was pleaded by them that the heirs could only succeed to the land which had not been alienated during her life-time by Mt. Fatima Bibi, that she had effected a number of mortgages in respect of certain items of property which had not been challenged by the plaintiffs, that the defendants mortgagees could not be dispossessed without a redemption suit, that apart from the mortgages Abdul Haq was in possession under a gift made by Mt. Fatima Bibi in favour of Faqir Mohammad and that transfer was challenged by Ahmad Din and as a result of the compromise Ahmad Din got one-half of the land which he transferred to his son

Abdul Haq and that Abdul Haq therefore could not be dispossessed of this property by the plaintiffs. It may be observed that Abdul Haq claimed as a transferee from Faqir Mohammad. He contended that the compromise above mentioned amounted to a transaction of sale in respect of half of the property gifted by Faqir Mohammad in his favour. After this written statement had been filed the counsel for the plaintiffs made a statement before the Court finally framed issues in the case. In that statement the counsel said that the plaintiffs were not at present bringing a suit to challenge the gift made by Mt. Fatima Bibi in favour of Faqir Mohammad but were claiming a share in half of the property that came under the compromise to Ahmad Din as it was taken by him for the benefit of all the heirs of Sadar Din and they were, therefore, entitled to a share in that property which was in the possession of Abdul Haq. On the pleadings of the parties the trial Judge framed as many as seven issues but it is only issues 1 and 2 with which we are concerned in the present appeal and they are in these terms:

"1. Is the effect of the compromise in the suit Ahmad Din v. Faqir Mohammad, etc., this that the gift was totally set aside and nobody acquired any right of ownership under the compromise?"

2. If issue 1 be not proved then are the plaintiffs entitled to possession of any portion of the gifted land?"

[6] The trial Judge granted the plaintiffs a decree of only half of the land in suit (excepting the gifted area) as owners subject to the rights of mortgagees. The suit in respect of half of the gifted property that had come to Ahmad Din under the compromise in the declaratory suit was dismissed. It was held that the decree in the declaratory suit did not attract the provisions of S. 8 of Act 1 [I] of 1920 as it was not a decree declaring that the gift by Mt. Fatima Bibi in favour of Faqir Mohammad was not valid under custom. Both parties were dissatisfied with this decision with the result that two appeals were preferred to the Court of the District Judge, Gujranwala. The learned District Judge maintained the decision of the trial Judge on the merits of the case. He, however, allowed the appeal preferred by the defendants disallowing them costs. The plaintiffs have now, as already said, preferred an appeal against this decision to this Court.

[7] This appeal is limited to the property that was taken by Ahmad Din under the compromise of June 1933 from Faqir Mohammad. It was contended on behalf of the appellants that the property was taken by Ahmad Din as a representative of the entire reversionary body by way of a compromise and they were, therefore, entitled to take from him the share to which

they were entitled in the inheritance of Sadar Din. It was contended that the principles of s. 90, Trusts Act, were attracted to the facts of this case and that Ahmad Din was holding the property that he took under the compromise as a trustee on behalf of all the heirs of Sadar Din and he was, therefore, bound to deliver possession of it to the respective heirs who had claimed it in the present suit. It may be stated at the very outset that this case had not been put forward in the plaint but, as already observed, before issues were framed and when the plaintiffs had acquired knowledge of the stand taken up by defendant Abdul Haq, it was stated in clear terms that the plaintiffs were prepared to ratify the act of Ahmad Din in compromising the case with Faqir Mohammad and were thus entitled to take its benefit. It was half-heartedly argued that the provisions of s. 8 of Act 1 [I] of 1920 were also applicable to the decree that was passed in the suit on the basis of the compromise. The two Courts below rejected the contentions raised on behalf of the appellants. It was held that s. 8 could have no application whatsoever to the decree that was drawn up on the footing of the compromise. That decree obviously was not a decree contemplated by the terms of s. 8 of Act 1 [I] of 1920. The decree in Ahmad Din's suit declared him as an owner and in possession of half of the land that had come by gift by Faqir Mohammad. It did not declare that the gift by Mt. Fatima Bibi in favour of Faqir Mohammad was invalid under custom. That being so, the Courts below, in my opinion, rightly held that the provisions of s. 8 could not be made applicable to this case.

[8] On behalf of the respondents it was argued that Ahmad Din in the former case did not enter into the compromise with Faqir Mohammad as a representative of the heirs of Sadar Din. On the other hand, whatever he did he did for his own benefit. In the written statement as well as in the statement before issues Abdul Haq stated that he was a transferee of half of the land gifted from Faqir Mohammad and that he stood in the shoes of Faqir Mohammad as an alienee from the donee and therefore the plaintiffs had no right whatsoever to claim any share in the property that he took under the compromise from Faqir Mohammad. It was further argued that if Ahmad Din was regarded as a trustee on behalf of the plaintiffs, then the suit lodged by them for their share in this part of the property was hopelessly barred by limitation. It was urged that a beneficiary cannot claim ownership in the land in the hands of a trustee of which he is the legal owner and that without a conveyance no title passes from the trustee to the beneficiary and that being so, in order to claim a conveyance

the plaintiffs were bound to sue within six years of the date of the compromise and not having done so, they had lost all remedies against the so-called trustee.

[9] The points argued by the learned counsel on both the sides are not covered by any authority and the decision in this case must be given on first impression. The point that has arisen is novel and interesting. As I visualize the case it comes to this. Ahmad Din brought a suit to challenge the gift made by Mt. Fatima Bibi in favour of Faqir Mohammad. In the plaint he claimed to sue on behalf of all the reversionary heirs of Sadar Din. He indeed said so in clear terms in the plaint. Even if he had not said so, the rule of law on this subject is well settled. In the words of their Lordships of the Privy Council in 38 Mad. 406¹ such suit must be taken to be of a representative character. In that case following observations were made by their Lordships:

"As a general rule, such suits must be brought by the presumptive reversioner that is to say, by the person who would succeed if the widow were to die at that moment.' But under certain circumstances the 'next presumable reversioner would be entitled to sue.' There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question whether the next presumable heir is the legal representative of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights. . . . Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the relief sought is for their common benefit."

It is clear, therefore, that Ahmad Din's suit actually and constructively was a representative suit on behalf of all the heirs of Sadar Din to impugn the act of the widow under custom. He continued that suit for over a year in that capacity. On 14-6-1933, however, he entered into a compromise and prematurely terminated that suit and took possession of half of the property gifted during the life-time of Mt. Fatima Bibi. His conduct in making this compromise can be examined from a two-fold point of view. Presuming as one should ordinarily presume that he acted honestly, then it must be considered that he acted in the matter of this compromise in the same capacity in which he acted in lodging the suit. Giving him, therefore, the benefit of the rule of law that every man is supposed to act honestly it must be assumed that he entered into possession of half of this property under the

compromise that he made with Faqir Mohammad not only on his own behalf but on behalf of all the heirs of Sadar Din whose rights he had undertaken to protect by lodging the declaratory suit. If that be so, then he came into possession as a cosharer in the property that he recovered from the alienee. The title in the property vested in all the heirs of Sadar Din as he was their representative and anything taken by him must be assumed to have been taken by him on behalf of all of them. His possession must also be considered to be on their behalf. On that aspect of the case, therefore, the plaintiffs were certainly entitled to succeed and to recover from him their share in the property which was taken under the compromise by Ahmed Din and then made over to his son Abdul Haq. No overt act of any kind was alleged or put forward by Ahmed Din and Abdul Haq to the knowledge of the plaintiffs and even if they did allege or put forward an overt act against their interests their possession of the property is still within twelve years and by prescription therefore they could acquire no title whatsoever against the rights of the plaintiffs.

[10] The other aspect of the case that was put forward by the learned counsel for the respondents is that this man acted dishonestly. While entering into the compromise, he cast aside the robe that he put forward as a plaintiff in the suit and dropped his representative capacity and considering that as the other reversioners had not sued and had lost their limitation and the alienee was agreeable to give him half the property he thought fit to take that property for his own benefit to the prejudice of those whom he had claimed to represent when starting the litigation in the former suit. On this view of the case it must be assumed that Ahmed Din entered into possession of half of the property that he took from Faqir Mohammad as an owner in his independent right as a plaintiff in that suit. In other words as an individual reversioner by a bargain with Faqir Mohammad he grabbed the shares of other reversioners as well. His possession from the date of his entry on the land would certainly be adverse to the other reversioners but unfortunately for him he had not acquired any title by prescription in respect of this property at the date of the suit, as the suit was instituted within 12 years of that date. The only ground on which he could possibly succeed on this aspect of the case was that he was entitled to tack on the possession of Faqir Mohammad to his own but that he is obviously not entitled to do because he is certainly not a donee in respect of the property now in dispute. Undoubtedly he put forward a claim to the effect that he had purchased the property from Faqir

Mohammad but that claim is wholly untenable. He no doubt paid a sum of Rs. 175 to Faqir Mohammad but that did not represent the price of this property. The compromise does not say that the property was sold by Faqir Mohammad to Ahmed Din. Leaving out of consideration the form employed by the draftsman of this compromise and looking at the substance of the transaction it amounts to a recognition by the donee of the claim put forward by the reversioner. In order to retain half of the property the donee surrendered to the vigilant reversioner half of the property that he obtained under the gift. The possession, therefore, of the donee and of the reversioner cannot be tacked on to one another. That being so, by prescription Ahmed Din or his son acquired no title whatsoever in this property and the plaintiffs as heirs of Sadar Din are, therefore, entitled to claim a share in this property. It seems to me that the plaintiffs did not by any process lose their rights in this property. Faqir Mohammad's title never became indefeasible as against the reversionary body because before six years had run out his title was attacked by the institution of a declaratory suit. His title, therefore, was in litigation and never became indefeasible as against the reversionary body. The title of Ahmed Din and his son also did not become indefeasible as against the reversionary body as they did not hold the land for the requisite period after the expiry of which they could acquire title by prescription. The result, therefore, is that neither Faqir Mohammad nor Ahmed Din acquired any title in the property in dispute adversely to the rights of the heirs of Sadar Din. The widow Mt. Fatima Bibi died in the year 1940. The cause of action to bring a suit for possession accrued to these plaintiffs on that date and they are, therefore, entitled to claim a share in the inheritance in which they admittedly have $\frac{341}{480}$ share. In this view of the case no question of relationship of trustees and *cestui que* trust arises and it is unnecessary to discuss that aspect of the argument of the learned counsel. The result, therefore, is that this appeal is allowed; the decision of the two Courts below is modified and the plaintiffs in addition to the decree that has been given to them by the trial Judge are granted a decree to the effect that they are entitled to joint possession of their share in the land that came to Ahmed Din under the compromise of 14.6.1933 and was then given to Abdul Haq subject, of course, to the payment of their share in the sum of Rs. 175 which Ahmed Din paid to Faqir Mohammad and subject further to the payment of their share in the costs incurred by Ahmed Din in fighting out the former litigation. We assess the costs incurred by him for

the purpose of this decision at Rs. 150. In the circumstances of the case, the parties are left to bear their own costs throughout so far as this case is concerned.

Abdur Rahman J.—I agree.

D.H.

Appeal allowed.

A. I. R. (35) 1948 Lahore 103 [C. N. 37.]

ABDUR RAHMAN AND MAHAJAN JJ.

Boota Ram — Plaintiff — Appellant v. Bagga Singh and another — Defendants — Respondents.

Second Appeal No. 1827 of 1944, Decided on 16th April 1947, from decree of Dist. Judge, Amritsar, D/- 9th October 1944.

(a) Punjab Pre-emption Act (1 [I] of 1913 as amended by Act 1 [I] of 1944), S. 21A — Deed of gift in favour of vendee executed before suit for pre-emption but registered after institution of suit — Registration Act (1908), S. 47.

A deed operates according to law from the date of its execution and not of its registration. Where therefore a deed of gift in favour of a vendee (by which gift the vendee improves his status) is executed before the date of suit for pre-emption, the provisions of S. 21A according to which vendee cannot improve his status after the institution of the suit, do not stand in the way of the vendee even though the deed of gift is registered after the institution of the suit. [Para 7]

Annotation : ('45-Com.) Registration Act, S. 47, Note 7.

(b) Civil P. C. (1908), O. 41, R. 27 — New Act having retrospective effect coming into force during pendency of appeal — Plea under new Act — Appellate Court can take evidence in support or otherwise, of plea—Punjab Pre-emption Act (1 [I] of 1913), S. 21A.

Where during the pendency of an appeal in a pre-emption suit the Punjab Act 1 [I] of 1944 having retrospective effect comes into force, and a plea is taken under it that the vendee could not improve his status during the suit, the vendee can be called upon to produce evidence to show that he has improved his status before the suit and not after the institution of the suit, since no such objection was raised before the trial Court. [Para 6]

Annotation : ('44-Com.) C. P. C., O. 41, R. 27, Note 8.

(c) Civil P. C. (1908), S. 11 — Question at issue different in subsequent suit—Previous order in revision does not operate as *res judicata*.

Where an order in revision was not inter partes in the subsequent suit and the question at issue in the revision was different to that in subsequent suit and the Court in revision was not called upon to decide the question agitated in the suit, the order in revision does not operate as *res judicata*. [Para 10]

Annotation : ('44-Com.) C. P. C., S. 11, Notes 7, 12, 41.

(d) Punjab Alienation of Land Act (13 [XIII] of 1900), S. 2 (3) — Land not cultivated for four successive harvests does not cease to be "agricultural land."

Obiter — Land does not cease to be agricultural or outside the scope of the Punjab Alienation of Land Act merely because it has not been cultivated for four successive harvests. It may be different if the land is full of pits and thus incapable of being put to cultivation. [Para 11]

(e) Punjab Pre-emption Act (1 [I] of 1913), S. 15 (c) (thirdly)—"Estate"—Part of estate lying fallow —When ceases to be "part of estate."

If an area does not fall within the definition of the term "land" as defined by the Punjab Alienation of Land Act it would still remain a part of an estate within the meaning of Punjab Land Revenue Act as long as its owner has not, by converting it into a building site in a village or in a town, walked, so to say, out of the estate. In other words, an area of land although lying fallow and useless in any estate and although not occupied for purposes either agricultural or subservient to agriculture or for pasture does not cease to be a part of the estate within the meaning of the Punjab Pre-emption Act as long as it has not in fact ceased to be a part of the estate by being translated into other category permanently, that is, either by becoming village immovable property or urban immovable property. [Para 15]

Consequence would be the same even if the land is found to fall within the purview of Punjab Alienation of Land Act : 20 A. I. R. 1933 Lah. 213 and 23 A. I. R. 1936 Lah. 202, *Commented upon* ; *Case law referred*. [Para 16]

Cases referred :—

1. ('37) 24 A.I.R. 1937 Lah. 755: 173 I. C. 953, Hardit Singh v. Mohindar Singh.
2. ('33) 20 A.I.R. 1933 Lah. 213: 141 I.C. 363, Chanan Din v. Chanan Din.
3. ('36) 17 Lah. 322 : 23 A. I. R. 1936 Lah. 202 : 166 I. C. 408, Shah Mahomed v. Mt. Pairi.
4. ('29) 16 A. I. R. 1929 Lah. 164 : 115 I. C. 417, Uttamchand v. Khodaya.
5. ('40) 42 P. L. R. 108, Inder Singh v. Jiwa Ram.

Hem Raj Mahajan and M. L. Mehra —
for Appellant.

Bhagwan Das Mehra and H. L. Soni —
for Respondents.

Abdur Rahman J.—This appeal arises out of a suit for possession by pre-emption of 81 kanals of land situate in village Bela Chak in Tahsil Tarn Taran (Amritsar District). It was sold by Bagga Singh, an agriculturist, to Munshi Ram, a non-agriculturist, by means of a sale deed dated 26th March 1941 which was registered on 7th February 1942 in consequence of a decree of a civil Court under S. 77, Registration Act, after its registration had been refused by the registration authorities on the ground that the land could not be conveyed by an agriculturist in favour of a non-agriculturist.

[2] The suit out of which the present appeal arises was instituted by Buta Ram, a non-agriculturist, on the ground that he was an owner in the same patti in which the land sold to Munshi Ram was situate. This was not denied but the suit was resisted on the ground that the vendee had improved his status before the suit by acquiring two plots of land in the same patti or estate under a gift and by means of an exchange. The plaintiff urged in reply that the plots of land so acquired by the vendee were of no avail to him as they were in respect of *banjar qadim* land and did not, therefore, invest him with a status equal to that of the pre-emptor. In other words, the contention was that the land

being *banjar qadim* was not "agricultural land" within the meaning of that term as applicable to the Punjab Pre-emption Act, and that the vendee could not, therefore, be regarded to be an owner in the estate; for according to this contention an owner of an agricultural land alone could be regarded to be an owner of the estate.

[3] This contention prevailed before the trial Court and the pre-emption suit was decreed. But it did not find favour with the learned District Judge, Amritsar, on appeal, which was allowed and the suit dismissed. Buta Ram, the plaintiff-pre-emptor, has preferred this second appeal.

[4] It was contended on behalf of the appellant in this Court that inasmuch as the deeds of gift and of exchange came into operation on 1st July 1943 (Ex. D-14) and 7th March 1943 (Ex. D-16), respectively, and were completed in favour of the vendee after the institution of the suit, they have to be disregarded in view of the retrospective character of Act 1 [I] of 1944, according to which a vendee could not improve his status after the institution of the suit.

[5] The two questions, therefore, that fall to be determined in this appeal are: (a) whether the vendee had acquired land by gift or exchange before the institution of the suit? (b) and if so whether the acquisitions by the vendee had succeeded in conferring the same status on the vendee as had been possessed by the pre-emptor?

[6] As to the first question we permitted learned counsel for the respondent to produce the deeds by which he acquired the status. This had to be done as it was not necessary for the respondent to establish during the trial that he had improved his status before the institution of the suit and not before the date on which the decree was passed against him but had to be established in consequence of the Punjab Act 1 [I] of 1944 which came into existence at or about the time when the suit was decided by the trial Court. Had this objection been advanced on behalf of the appellant before the lower appellate Court, the respondent would have undoubtedly been called upon to prove the date on which he acquired the plots of land by means of a gift or exchange.

[7] The respondent contented himself by producing a copy of the deed of gift and a copy of the judgment of the civil Court which had granted a decree in favour of the respondent, under S. 77, Registration Act. No objection was taken by the appellant to their reception in evidence and without a formal proof in respect of the sale deed. After looking into the deed of gift I find that it was executed in favour of the respondent on 6th January 1943 although it was not registered until Suit No. 211 of 1943

brought by the present respondent under S. 77, Registration Act, for a declaration had been decreed by the Subordinate Judge at Amritsar on 9th June 1943. By this document the respondent acquired four bighas and $18\frac{1}{2}$ kanals of land in the same estate in which the land in dispute was situate. Since the deed would be according to law operative from the date of its execution and not of its registration the first point must be decided in favour of the respondent and he must be held to have acquired the land by gift before the institution of the suit. The provisions of Act 1 [I] of 1944 do not, therefore, stand in his way.

[8] This takes me to the second and main question agitated before us. Mr. Ram Raj Mahajan, learned counsel for the appellant, contends that in so far as the land acquired by the vendee-respondent on the basis of which he had advanced the contention that the plaintiff's right was not superior to him, had been lying fallow for a number of years (D/19) and had not been used for pasture it was not agricultural land and could not, therefore, be held to form part of the estate in which the land in dispute was situated. Reliance was placed in support of this contention on a decision of a learned Single Judge of this Court in A. I. R. 1937 Lah. 755.¹ It may be observed that the term 'agricultural land' has not been defined by the Punjab Pre-emption Act but has been stated in it to have the same meaning as given to that term in the Punjab Alienation of Land Act, 1900, subject to certain modifications which are for the present purpose irrelevant.

[9] It was also urged that with the amendment of S. 298, Government of India Act, by S. 4, India and Burma (Temporary and Miscellaneous Provisions) Act, 1942, retrospectively, the alienation of agricultural land—if it is held to be so—in favour of the vendee, whether by gift or exchange, whatever its effect before the amendment of the Constitution Act, could be of no help to the vendee as he was a non-agriculturist and the alienation in his favour would be void as being in contravention of both S. 3, Punjab Alienation of Land Act 13 [XIII] of 1900 and of S. 298, Constitution Act, after its amendment. Learned counsel for the appellant advanced his contention in the alternative. He urged that if the land on the basis of which the vendee was trying to defeat the plaintiff was not agricultural it could not form part of an estate and could not, therefore, give him any status which could be equal to that of the plaintiff. But if on the other hand it was held to be "agricultural land" the alienation in favour of the vendee would fall within the mischief of the Punjab Alienation of Land Act and would be

altogether void. This was met by learned counsel for the respondent with the contention that if the alienation of land by gift in his client's favour were invalid so would the pre-empted sale be; and if there was no sale in favour of the vendee, and the title to the land in suit had not passed to his client, the plaintiff's suit for pre-emption must be dismissed for that reason alone. As for the first contention it was urged that whatever may be the definition of 'land' in the Punjab Alienation of Land Act, it is not necessary for an owner of the estate, as that expression is used in S. 15 (3) (thirdly), Punjab Pre-emption Act, to own agricultural land necessarily and that a person can be an owner of the estate if he happens to own a revenue paying land as long as that parcel of land has not become either urban or village immovable property. The land would, in his submission, continue to form part of the estate unless *ex necessitate rei* it has ceased to be so and assumed on account of user a different character. Learned counsel for the appellant contended in reply to the second contention advanced on behalf of the defendant-vendee that the validity of the sale of the land in favour of the vendee had been challenged by the Deputy Commissioner, Amritsar, under the Punjab Alienation of Land Act, but the revision was rejected by a learned Single Judge of this Court (Civil Revision No. 798 of 1940) on the ground that the area conveyed to Munshi Ram was not covered by the definition of the word "land" and the decision of the Subordinate Judge ordering registration of the sale-deed in respect of the land in suit in favour of the vendee-defendant was upheld with the result that the validity of alienation of the pre-empted land can no longer be questioned.

[10] The order in revision has, however, no binding force as it was not *inter partes* and it was in respect of the land which formed the subject-matter of the suit and not on the basis of which the defendant had tried to improve his status. Moreover, the learned Judge was not called upon to decide whether the land fell within the definition of "agricultural land" within the meaning of the Punjab Pre-emption Act. All that he had to decide was whether the alienation by Bagga Singh—an agriculturist—in favour of a non-agriculturist, as Munshi Ram happened to be, was open to attack under the Punjab Alienation of Land Act. He held that even if some cattle had occasionally grazed on the land sold by Bagga Singh, as the evidence led on behalf of the Deputy Commissioner seemed to indicate, it could not be held to be a pasture and would not fall within the definition of the term "land" as given in the Punjab Alienation of Land Act. According to his decision there

could be areas of land which did not fall within the ambit of the Punjab Alienation of Land Act and the area conveyed by Bagga Singh was one of such areas. But he was not called upon to decide and did not, therefore, adjudicate on the question whether the owner of such an area would be the owner of an estate as used in S. 15 (3) (thirdly), Punjab Pre-emption Act. And that is the question, which we have to determine in the present appeal.

[11] The contention as regards the amendment of the Constitution Act does not take us any further either. The omission of the words 'gift' or 'exchange' in S. 298, Government of India Act, had led to the contention that the provisions of the Punjab Alienation of Land Act must be taken to have been abrogated and alienations by exchange or gift could not be attacked under the Punjab Alienation of Land Act. This contention was accepted and although the alienations by sales or mortgages were held to be valid the alienations by gifts or exchanges were not held to be so. By amending the Act and using the word 'dispositions' in place of sales or mortgages the Parliament ruled that all alienations which were invalid under the Punjab Alienation of Land Act would continue to be so. This is not, however, the point with which we have any concern in the present case. The question only is whether the defendant by acquiring the land before the suit under a gift had not become an owner of the estate. If that land was agricultural the alienation would be void under the Punjab Alienation of Land Act. But if the land did not fall within the definition of that term under that Act the validity of its alienation could not be questioned under the Act. I may observe in passing, however, that the land does not cease to be agricultural or outside the scope of the Punjab Alienation of Land Act merely because it has not been cultivated for four successive harvests, i. e., two years when according to Douie's Settlement Manual, it would have to be recorded as Banjar Jadid in revenue papers and as Banjar Qadim if it has not been cultivated for 8 harvests, i. e. for a period of four years (see para. 267 p. 191). It may be different if the land is full of pits as the pre-empted land was found to be by Blacker J., and thus incapable of being put to cultivation, but with that aspect of the case I am not at present concerned. Nor am I concerned in finding the character of the pre-empted land as the plaintiff and Munshi Ram vendee are non-agriculturists and a decree of this Court, if in favour of the pre-emptor appellant would not contravene the provisions of the Punjab Alienation of Land Act.

[12] I must now examine the main conten-

tion advanced on behalf of the respondent that a person who happens to possess land which pays revenue to the Government, as the land gifted to the vendee admittedly does in this case, is an owner of the estate within the meaning of S. 15 (c) (thirdly) of the Punjab Pre-emption Act, if the land is not shown to have been put to any use for the purposes of agriculture or for those which are subservient to agriculture or even for purposes of pasture. According to him the fact that it is assessed to land revenue is enough and that alone should determine the character of its being a part of the estate as the term is used in S. 15, Punjab Pre-emption Act. Reliance was placed by learned counsel for the respondent in this connection on the decision of a learned Single Judge in A. I. R. 1933 Lah. 213.² Learned counsel for the appellant vehemently contended that an assessment of land revenue is not enough to retain land within the definition of an 'estate' for there may be areas of land which have been absorbed by towns or villages and even substantial buildings erected thereon and which are yet assessed to land revenue. By way of illustration he drew our attention to a number of houses in Mozang — a vicinity of Lahore—which is to all intents and purposes a part of the town of Lahore and yet they are assessed to land revenue. Reference was made by learned counsel for the appellant to a decision of the Division Bench of this Court in 17 Lah. 322³ where it was held

"that the owner of a plot of land situate within the municipal limits of a town, which was once agricultural land and which was afterwards built upon and became urban immovable property, can no longer be deemed to be an 'owner of the estate' within the meaning of S. 15 (c), thirdly, of the Punjab Pre-emption Act, so as to be entitled to pre-empt the sale of agricultural land situate within the same municipal limits, notwithstanding that the land is still assessed to land revenue and is shown in the revenue papers as bearing a separate *khassra* number."

[13] The term "estate" has not been defined in the Punjab Pre-emption Act, but it is provided in S. 3, sub-cl. (c) of the Act that

"any expression which is defined by S. 3, Punjab Land Revenue Act, 1887, shall subject to the provisions of this (Pre-emption) Act, have the meaning assigned to it in the said section."

The term "estate" is defined by S. 3, Punjab Land Revenue Act and is stated to mean

"any area (a) for which a separate record-of-rights has been made; or (b) which has been separately assessed to land-revenue, or would have been so assessed if the land-revenue had not been released, compounded for or redeemed; or (c) which the Provincial Government, may, by general rule or special order, declare to be an estate."

It would appear from this definition that an area (which would include land both agricultural and non-agricultural as long as it does not form part of village or urban immovable pro-

perty) which has been separately assessed to land revenue would fall within the definition of "estate" which forms the unit of revenue assessment, and the different *khewats* included in an estate, even if owned by different persons, would not cease to be a part of the estate merely because the revenue which they are liable to pay has been separately shown by the patwari for the convenience of those who are liable to pay the same. An estate cannot, in my opinion, be held to have been divided into so many estates merely because every *khewat* is stated or described by the patwari to pay a particular sum of money as its share of land revenue. If the unity of an estate has not been disturbed by the indication of separate revenue which each owner of *khewat* is liable to pay, the whole of the estate would continue to form one unit and the owner of a portion of that estate would continue to enjoy such privileges as its ownership confers on him by law. I must, however, agree that if a portion of the estate has by constant and permanent user fallen into the category of village or urban immovable property, it would cease to form part of an estate as that certainly implies at least this, if nothing more, that whether agricultural or not, it still continues to be in the same category in which it was when it formed part of an estate and its character had not been changed by any permanent variation in its user so as to bring it under any other well recognised category.

[14] As for the decision in 17 Lah. 322,³ no exception can possibly be taken to the conclusion at which the learned Judges had arrived and I respectfully agree with them that the decision of a learned Single Judge of this Court in A. I. R. 1933 Lah. 213² was too general and the assessment of an area to land revenue cannot be the sole determining factor. To that extent I would with respect agree with the decision of another Judge of this Court who was a party to 17 Lah. 322³: see A. I. R. 1929 Lah. 164.⁴ But the observation towards the end in 17 Lah. 322,³ was, I am afraid, rather loosely expressed and it was this observation on which stress was laid by learned counsel for the appellant. The observation is to the following effect:

"Moreover, the word 'estate' as defined in the Punjab Land Revenue Act, in our opinion, applies to agricultural lands only and does not include any other class of property."

It was not necessary for the learned Judges to make this observation in that case and it was really in the nature of an *obiter*, for I can conceive of cases where the land may not become part of either urban or village immovable property and may not yet be 'land' within the definition of the term as given in the Punjab

Alienation of Land Act. The decision by Blacker J. in C. R. No. 798 of 1940 to which reference has already been made is one of such instances. If it is on the other hand converted into building site, whether in a village or in a town, its owner, so to say, may be correctly stated to have walked out of the estate and ceased to have any connection with it any longer. But as long as it has not been put to any other substantial and permanent use and thus not brought into another category, it would not merely by non-user cease to be a part of the estate even if it ceases to be 'land' within the meaning of the Punjab Alienation of Land Act. That is how the decision in 17 Lah. 322³ was interpreted by Din Mohammad J. himself who was a party to that case when he was called upon to construe it in 42 P. L. R. 108.⁵

[15] I am, therefore, of the view that if an area does not fall within the definition of the term "land" as defined by the Punjab Alienation of Land Act it would still remain a part of an "estate" as long as its owner had not, by converting it into a building site in a village or in a town, walked, so to say, out of the estate. In other words, I am of opinion that an area of land although lying fallow and useless in any estate and although not occupied for purposes either agricultural or subservient to agriculture or for pasture does not cease to be a part of the estate within the meaning of the Punjab Pre-emption Act as long as it has not in fact ceased to be a part of the estate by being translated into other category permanently, that is, either by becoming village immovable property or urban immovable property.

[16] There is no denying the fact that the land on the basis of which the defendant wants to be declared an owner of the estate is assessed to land revenue and although by remaining fallow for a number of years it may not fall within the definition of "land" as defined in the Punjab Alienation of Land Act, yet not having been converted into any category it does not cease to be land within the meaning of the Punjab Pre-emption Act and would continue to form part of an estate as that term is defined in the Land Revenue Act. I have so far assumed that the land acquired by the vendee did not fall within the definition of the Punjab Alienation of Land Act. But the consequence would be the same if it was found to fall within its purview.

[17] For the above reasons, I would hold that by acquiring the land by gift the defendant-vendee has acquired a status equal to that of the pre-emptor and this appeal should accordingly be dismissed. But having regard to the difficult nature of the question involved I would

leave the parties to bear their own costs throughout. The cross-objections are for the above reasons also dismissed but without costs.

Mahajan J. — I agree.

R.G.D.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 107 [C. N. 38.]

MAHAJAN AND ACHHRU RAM JJ.

Jamal Din — Defendant — Appellant v. Mohammad Aslam — Plaintiff — Respondent.

Second Appeal No. 379 of 1945, Decided on 29-4-1947, from decree of Dist. Judge, Jullundur, D/- 21-12-1944.

Punjab Pre-emption Act (1 [I] of 1913), S. 3 — Agricultural land — Small hut built on small portion of agricultural land — Rest utilised for growing fruit, vegetable and fodder — Land is agricultural — Hut is not separate property — Punjab Alienation of Land Act (1900), S. 2 (3).

Where the suit land which originally was admittedly agricultural land was purchased by A and subsequently he built a small hut for his own residence on a small portion of the land and planted a fruit garden on the rest of the land, and after some years sold the land to B, who after the purchase never used the hut for his residential purposes and the only use to which the land was put by B was the raising of fruit and cultivation of vegetables and fodder :

Held that the primary use to which the land was being put while in possession of B was agriculture : 24 A. I. R. 1937 Lah. 182, *Rel. on.* [Para 5]

Held further that the only use to which the hut could possibly be put was for purposes subservient to agriculture. It was not therefore a residential house and was in no sense a separate property. [Para 6]

Case referred :—

1. ('37) 24 A.I.R. 1937 Lah. 182 : 172 I. C. 398, Abdul Rahman v. Haji Rashid Ahmad.

R. C. Soni and R. B. Badri Das — for Appellant.

A. N. Kirpal and Dr. Shuja-ud-Din —

for Respondent.

Achhru Ram J.—On 21-9-1942, 27 kanals and 8 marlas of land situate in the revenue estate of Jullundur was sold by K. B. Sh. Siraj-ud-Din to Sheikh Jamal-ud-Din for Rs. 12,400. On 17-7-1943, Sheikh Mohammad Aslam, the son of the vendor, brought a suit for possession of the aforesaid land by pre-emption. The suit was resisted by Jamal-ud-Din vendee on two grounds: (1) That the property sold was not agricultural land but was urban immovable property and, therefore, the sale was not liable to be pre-empted and (2) that Rs. 223 had been spent by him on the execution and registration of the sale-deed in addition to the sale price of Rs. 12,400 and a large sum of money had also been spent on effecting improvements on the suit property and that in case of success the plaintiff was liable to recoup him for all the expenses so incurred.

[2] The learned trial Judge held the suit property to be agricultural land. He also held that the vendee was entitled to a sum of Rs. 223 in addition to the sale price, the aforesaid sum

having been spent by him on the execution and the registration of the sale-deed. The vendee was not, however, found entitled to any compensation on account of the costs of improvements effected by him. The plaintiff was accordingly granted a decree for possession of the land in suit subject to payment of Rs. 12,623. Certain structures had been raised on the land during the pendency of the suit. The decree passed by the learned trial Judge directed that the vendee could remove the structures within two months from the date of the decree and that otherwise the plaintiff would be entitled to take possession of the land along with the structures. On appeal by the vendee, the learned District Judge affirmed the decree for possession subject to payment of Rs. 12,623. He, however, deleted the rider that had been added by the learned trial Judge in respect of the structures that had been raised on the suit land by the vendee during the pendency of the suit. The vendee has come up in second appeal to this Court.

[3] The only point that was urged on behalf of the vendee in this second appeal was that the suit property was not agricultural land within the meaning of the Punjab Pre-emption Act and that the sale was accordingly not pre-emptible. According to the evidence led by the vendee, the suit land was purchased by one Rikhi, a Brahmin, about 25 years ago when it was admittedly agricultural land. The aforesaid Rikhi built a small hut also known as a Kothi for his own residence on a small portion of the land purchased by him and planted a fruit garden on the rest of the land. The land was purchased by the vendor K. B. Sh. Siraj-ud-Din from the widow of Rikhi about the year 1937. The learned District Judge has found after a consideration of the oral and documentary evidence produced by the parties that at the time of the sale only 3 marlas and 8 sarsahis out of the whole land were covered by the structure which is known as Kothi that ever since he purchased from the widow of Rikhi in 1937, K. B. Sh. Siraj-ud-Din had not made any alteration in the property and nobody had been residing in the Kothi since then, and that at the time of the purchase by the present vendee there were fruit trees growing on the land and the owner also used to cultivate fodder and vegetables in between the trees. These are all findings of fact which are not challengeable in second appeal. On these facts there can be no reasonable doubt about the correctness of the conclusions reached by the learned District Judge as to the suit property being agricultural land at the material time.

[4] Sub-section (1) of S. 3, Punjab Pre-emption Act, adopts the definition of the Punjab Alienation of Land Act in so far as the expression

"land" is concerned. Sub-section (8) of S. 2, Punjab Alienation of Land Act, provides that the expression "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes the sites of buildings and other structures on such land. In A. I. R. 1937 Lah. 182¹ a Division Bench of this Court held that agriculture includes fruit raising and that a fruit garden must, therefore, be regarded as agricultural land within the meaning of the Punjab Pre-emption Act.

[5] Mr. Badri Das, the learned counsel for the appellant, stressed only two points. He contended in the first instance that the primary use to which the suit land was being put at the time of the sale was not agriculture but residence and that the fruit and the vegetable garden were merely intended to be appurtenant to the residential house to be used for the comfort of the person residing in that house. This contention of the learned counsel, however, is not supported by the facts found by the learned District Judge or by the evidence on the record. Whatever may have been the situation while the suit land was in the occupation of Rikhi even then the land appears to have been occupied primarily for raising fruit and vegetables although the owner had also his residence in the small hut that he had constructed on a very small portion of the land ever since its sale to K. B. Sh. Siraj-ud-Din in 1937, the Kothi has never been occupied for purposes of residence and the only use to which the land has been put has been raising of fruit and cultivation of vegetables and fodder. Under the circumstances, it is not possible to hold that the primary use to which the land was being put at the time of the sale sought to be pre-empted was otherwise than agriculture.

[6] It was next contended by Mr. Badri Das that the suit should be dismissed at least in respect of the structure known as the Kothi and the site thereunder which according to him was a separable property and had been separately occupied as a residential house. I find myself unable to accept this contention of the learned counsel as well. Only 3 marlas and 8 sarsahis out of the whole land are under a building. The building was not being used as the residential house at the time of the sale and the only use to which it could possibly have been put was for purposes subservient to agriculture. It was not a residential house and is in no sense a separate property. For the reasons given above, I see no force in this appeal and would dismiss the same with costs.

Mahajan J.— I agree.

N.S.D.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 109 [C. N. 39.]

ACHHRU RAM J.

Kuldip Raj and others—Plaintiffs — Appellants v. District Board, Gurdaspur, and another—Defendants—Respondents.

Second Appeal No. 1723 of 1945, Decided on 26th March 1947, from decree of Senior Sub-Judge, Gurdaspur, D/- 12-5-1945.

(a) Civil P. C. (1908), S. 11 — Previous suit for possession of property against A, B and C, decreed against A alone — Subsequent suit for recovery of rent of same property against D and C — C not barred from pleading want of title in plaintiff.

P brought a suit for possession of certain property against A, B and C and it was decreed against A for possession and not a word was said in the decree or in the judgment involving a decree declaring P's title to the suit property against the other defendants B and C. P subsequently brought a suit to recover rent of the property against D who was the tenant of the property since before the decision of the previous suit, and C. C resisted the suit and denied P's title to property in dispute :

Held, that the decision in the previous suit did not operate as *res judicata* as against C and did not bar his plea as to want of P's title to the suit property : 16 A. I. R. 1929 Cal. 449; 11 A. I. R. 1924 Mad. 626 and 3 A. I. R. 1916 Bom. 277, *Disting.* [Para 8]

Annotation: ('44-Com.) C. P. C., S. 11, Notes 41, 42.

(b) Evidence Act (1872), S. 13 — Previous judgment how far relevant.

A judgment in a previous suit decreeing suit for possession is only relevant in a subsequent suit, under S. 13, for the purpose of proving that at that time there was a successful assertion on the plaintiff's part of his title to the property in dispute. The finding on which the judgment was based or the reasons given by the Judge in support of that finding are not relevant: 19 A. I. R. 1932 Pat. 105 and 19 A. I. R. 1932 Mad. 254, *Ref.* [Para 9]

Annotation: ('46-Man) Evidence Act, S. 13 N 9.

(c) Civil P. C. (1908), S. 100 — Finding of fact — Appreciation of evidence is question for first appellate Court.

The question of appreciation of evidence whether oral or documentary is essentially a question for the first Court of appeal and a finding of fact does not become assailable in second appeal merely because, in coming to that finding, the Court of first appeal had to appreciate evidence consisting of a successful assertion of title in a previous case which assertion was relevant under S. 13, Evidence Act. [Para 10]

Annotation: ('44-Com.) C. P. C., Ss. 100 and 101, N. 34.

Cases referred:—

1. ('29) 16 A. I. R. 1929 Cal. 449 : 122 I. C. 547, *Murad Biswas v. Baeti Mandal.*
2. ('24) 11 A. I. R. 1924 Mad. 626 : 84 I. C. 799, *Veeraswamy Mudali v. Palaniyappan.*
3. ('16) 40 Bom. 662 : 3 A. I. R. 1916 Bom. 277 : 36 I. C. 74, *Mota Holiappa v. Vithal Gopal.*
4. ('21) 48 Cal 460 : 9 A. I. R. 1922 P. C. 241 : 48 I. A. 49: 64 I. C. 231 (P.C.), *Midnapore Zamindari Co. Ltd. v. Naresh Narayan Roy.*
5. ('35) 1935 O. W. N. 894: 23 A. I. R. 1936 Oudh 189: 165 I. C. 132, *Mt. Aziman v. Ibrahim Beg.*
6. ('37) 24 A. I. R. 1937 P. C. 69 : 16 Pat. 258 : 31 S. L. R. 242: 167 I. C. 329 (P.C.), *Kesho Prasad Singh v. Mt. Bhagjogna Kuer.*
7. ('32) 11 Pat. 50 : 19 A. I. R. 1932 Pat. 105 : 136 I. C. 577, *Purnima Debya v. Nand Lal Ojha.*

8. ('32) 55 Mad. 346 : 19 A. I. R. 1932 Mad. 254 : 136 I. C. 348 : 33 Cr. L. J. 307, *Padmanabhani Ramamma v. G. Appalanarasayya.*

F. C. Mittal — for Appellants.

Inder Dev Dua — for Respondents.

Judgment. — This is a second appeal from the decree of the learned Senior Subordinate Judge, Gurdaspur, affirming, on appeal, the decision of the learned trial Judge dismissing the plaintiffs' suit for recovery of Rs. 30 as their share of the rent in respect of a 1/6th share of a building known as *serai* situate in the village Kanjrur in Tehsil Shakargarh in the district of Gurdaspur and for issue of a permanent injunction against Parkash Chand, defendant 2, restraining him from recovering in future the plaintiffs' share of the rent in respect of the aforesaid property from defendant 1, the District Board of Gurdaspur.

[2] This case has had a chequered history. The facts giving rise to this appeal may be briefly stated as follows. One Gokal Chand who was owner of considerable immovable property consisting of agricultural lands and houses situate in Kanjrur, and may be also elsewhere, died leaving him surviving two sons Hari Chand and Lakhmi Chand, the father of Parkash Chand, defendant 2. Hari Chand's son Dhanpat Rai died in the year 1911 leaving him surviving a widow Mt. Karam Devi by name and a daughter Mt. Ram Khetri by name. On 26th February 1926 Mt. Karam Devi transferred the entire property that had devolved upon her on the death of her husband Dhanpat Rai, which consisted of a 1/2 share in the property which had descended from Gokal Chand to both his sons Hari Chand and Lakhmi Chand, to Mt. Ram Khetri. Mt. Ram Khetri soon found herself involved in a large number of civil and criminal cases with Lakhmi Chand, and may be also with some others, and presumably on account of her inability to cope with the situation created by the litigation in which she found herself involved, on 22nd December 1926 she entered into an agreement with Buta Mal, the husband of Mt. Ishara Devi plaintiff and the father of the other plaintiffs, whereby she transferred a 1/3rd share in all the properties that had been gifted in her favour by her mother Mt. Karam Devi, in consideration of the aforesaid Buta Mal having agreed to finance her, and otherwise to look after her interests, in that litigation and to help her in every possible way to fight all the criminal and civil cases, to which she was or might become a party. On 12th December 1927 Lakhmi Chand brought a suit against his brother's widow and daughter and also against Buta Mal for a declaration to the effect that the alienation made by Mt. Karam

Devi in favour of Mt. Ram Khetri would not affect his reversionary rights after the death of Mt. Karam Devi in respect of the agricultural lands and that it was wholly inoperative and ineffective in respect of the residential property purporting to have been conveyed by Mt. Karam Devi to Mt. Ram Khetri because of the former having no title to that property at all and the plaintiff being its owner and in possession as such. The list of the residential property in respect of which the suit was brought seems to include the *serai* which forms the subject-matter of the present litigation. Buta Mal was murdered during the pendency of the suit and his sons, and widow, namely, the present plaintiffs were brought on the record as his legal representatives. This suit ended on 23rd December 1929 in a compromise to which only Lakhmi Chand, Mt. Karam Devi and Mt. Ram Khetri were parties. The legal representatives of Buta Mal were not parties to this compromise and the suit against them appears to have been withdrawn. Some time before one Jaswant Rai attached the *serai* in dispute in execution of his decree against Lakhmi Chand and had it put up for sale. At the execution sale, it was purchased by one Jagdish Rai. In 1936, the plaintiffs brought a suit against Mt. Ram Khetri, Lakhmi Chand, Parkash Chand and Narain Parkash sons of Lakhmi Chand, and Jagdish Rai, for possession of a 1/3rd share in what they alleged to be the property of Mt. Ram Khetri acquired by her as a result of the gift made in her favour by her mother Mt. Karam Devi, including a 1/2 share of the *serai*. It was alleged in the plaint that the plaintiffs, under the agreement executed by Mt. Ram Khetri in favour of Buta Mal on 22nd December 1926, were entitled to a 1/6th share, being 1/3rd of Mt. Ram Khetri's 1/2 therein; that it was, at the time of the institution of the suit, in the possession of Jagdish Rai, defendant 5, who represented himself to be an auction-purchaser of the aforesaid property; but that the aforesaid defendant had no right to, or interest in, any part of the property in question. The suit was resisted by Mt. Ram Khetri on the ground that the agreement which formed the basis of the plaintiff's suit and which she was alleged to have executed in favour of the late Buta Mal was not valid and did not bind her inasmuch as its execution had been secured by the said Buta Mal by means of undue influence and, further, because the terms of the agreement were unconscionable and extortionate. In respect of the property now in dispute in which, as stated before, a 1/6th share had been claimed by the then plaintiffs, the suit was resisted by Lakhmi Chand, his two sons and Jagdish Rai on the pleas that the whole of the *serai* had been law-

fully sold in execution of Jaswant Rai's decree against Lakhmi Chand, to whom it originally belonged; that Jagdish Rai had purchased it at the sale as a *banamidar* for Parkash Chand and Narain Parkash; and that, subsequent to the execution sale, it had been retransferred to the aforesaid Parkash Chand and Narain Parkash who were in possession thereof as its owners. Issues 6 and 7 which were framed in respect of the aforesaid property ran as follows:

- (6) Whether properties Khe, Dal (the property in dispute) and DDAL belonged to Dhanpat Rai and defendant 1 was consequently competent to transfer them?
 (7) Whether the plaintiffs were not entitled to possession of property Dal because title to the same had at a court sale passed to defendant 5?

Their suit was finally disposed of by Mr. Purshotam Lal, Senior Subordinate Judge of Gurdaspur on 30th July 1937. On Issues 6 and 7 it was found, in respect of the property now in dispute, that Mt. Ram Khetri defendant had a 1/2 share therein and, therefore, was competent to transfer the same and that the title to that 1/2 share had not passed to defendant 5 at the alleged court sale to which Mt. Ram Khetri was not a party and by which she was not accordingly bound. In the result, however, a decree was passed in the plaintiffs' favour against Mt. Ram Khetri, defendant 1 above for possession of the entire property including the *serai*, the aforesaid defendant being given the option to avoid the enforcement of that decree by depositing into Court for payment to the plaintiffs, a sum of Rs. 25,000 and costs within six months from the date of the decree. No decree was passed against the remaining defendants, namely, defendants 2—5, who were left to bear their own costs. It seems that the sum of Rs. 25,000 was not deposited by Mt. Ram Khetri as directed by the decree with the result that the decree for possession passed in the plaintiffs' favour against Mt. Ram Khetri became operative.

[3] In 1935, the District Board of Gurdaspur rented the *serai* in dispute from Parkash Chand, defendant 2, agreeing to pay rent at the rate of Rs. 30 per mensem. It is not denied by the plaintiffs that the District Board has been in occupation of the *serai* since then as a tenant under the aforesaid Parkash Chand. It follows from this that even at the time the suit brought by the plaintiffs in 1936 against Mt. Ram Khetri and others including Parkash Chand was being fought and at the time it was decreed, the actual possession of the *serai* was with the District Board.

[4] On 15th April 1942 the suit giving rise to the present second appeal was instituted by the plaintiffs, the widow and the sons of Buta Mal,

for recovery of Rs. 30 from the District Board of Gurdaspur as their share of the rent in respect of the 1/6th of the *serai* which was claimed by them to be their property, and for issue of a permanent injunction to Parkash Chand, defendant 2, not to realise in future rent in respect of the aforesaid 1/6th of the *serai* from the District Board, the plaintiffs alone being entitled to such rent. The suit was resisted mainly by Parkash Chand, defendant 2 who denied the plaintiffs' alleged title to a 1/6th share in the property in dispute. The plaintiffs in reply averred that by reason of the decision on Issues 6 and 7 in the suit brought by them in 1936 Parkash Chand was not entitled to repudiate their title to a 1/6th share in the suit property and that the aforesaid decision operated as *res judicata*. On the pleadings of the parties, the learned trial Judge framed the following issues:

(1) Is the plea that the plaintiffs are not the owners of 1/6th share of the property in dispute barred by *res judicata*? (2) Are the plaintiffs owners of 1/6th share of the property in dispute? (3) Relief.

The suit was tried by Mr. Chaman Lal Puri, a First Class Subordinate Judge, who, deciding both the issues in the defendants' favour, dismissed the plaintiffs' suit on 22nd February 1943. On appeal, the learned Senior Subordinate Judge, Mr. Gian Chand Bahl, affirmed the decision of the learned trial Judge on Issue 1 and held that the decision in the suit of 1936 did not operate as *res judicata* and did not preclude defendant 2 from contesting the plaintiffs' alleged title to a 1/6th share in the property in suit. He, however, did not feel satisfied with the finding of the learned trial Judge on Issue 2 and remitted the case to him for a fresh decision after redeciding the said issue. The suit was heard and decided again by the same learned Subordinate Judge, who, although it was not necessary reaffirmed his previous decision on the question of *res judicata*, and, on Issue 2, held that the plaintiffs had failed to prove their alleged title to the suit property. In the result, he again dismissed the plaintiffs' suit. The plaintiffs again went up in appeal to the learned Senior Subordinate Judge of Gurdaspur, but without success. The learned Senior Subordinate Judge, who heard this appeal, felt inclined to disagree with the view of his predecessor-in-office as also of the learned Subordinate Judge, on the question of *res judicata* and expressed the opinion that the decision in the suit of 1936 did attract the application of the rule of *res judicata*. He, however, held that the decision of his predecessor was binding on him and that he was not entitled to go behind it and to reopen the matter. On the question of title, he agreed with the finding of the learned trial Judge and dismissed the appeal. The plain-

tiffs have come up in second appeal to this Court.

[5] Mr. Mittal, who argued the case on behalf of the appellants contended, in the first instance, that the decision of the learned Subordinate Judge, as also of the previous Senior Subordinate Judge who heard the appeal from the decree of the learned trial Judge, dated 22-2-1943, on the question of *res judicata* was not correct. He urged that although no decree had in fact been passed in the previous suit in the plaintiffs' favour against Parkash Chand, defendant 2, or against any defendant other than Mt. Ram Khetri, the decision on Issues 6 and 7 still operated as *res judicata*. He also urged that although the decree for possession was passed against Mt. Ram Khetri alone, in view of the express decision on Issues 6 and 7, a decree declaring the plaintiffs' title must also be deemed to have been impliedly passed against the remaining defendants.

[6] In so far as the contention of the learned counsel for the appellants as to the construction to be placed upon the decree is concerned, I find it to be wholly devoid of force. The only decree passed in the suit was one for possession against Mt. Ram Khetri defendant 1. Not a word was said in the decree or in the judgment which could by any stretch of imagination, be interpreted as involving a decree declaring the plaintiffs' title to any of the properties in suit against any of the other defendants.

[7] In support of his contention that even though there was no decree passed against Parkash Chand, defendant 2, in the previous suit, the decision on issues 6 and 7 operated as *res judicata*, the learned counsel relied on three judgments, namely, a judgment of the Calcutta High Court in A. I. R. 1929 Cal. 449,¹ a judgment of the Madras High Court in A. I. R. 1924 Mad. 626² and a judgment of the Bombay High Court in 40 Bom. 662.³ After a careful examination of the three cases, I am, however, of the opinion, that none of them really supports the contention of the learned counsel. In the Calcutta case, although the previous suit brought by the plaintiff for the ejectment of the defendants had been dismissed on the ground of want of proper notice, the suit had also been resisted by the defendant on the plea that they were the plaintiffs' co-sharers in the suit land and not tenants under them, and on this plea not only an express decision had been given, after framing an explicit issue, but a declaratory decree had also been actually made in the plaintiffs' favour in the following terms :

"Ordered that the plaintiff's alleged title to the land in suit be declared; he cannot recover khas possession of

the land but he may sue for settlement of fair rent and recovery of nazar if he likes."

Their decree was held to bar the plea of co-ownership in a subsequent suit for ejectment brought after service of a proper notice. In the Madras case also though the previous suit for ejectment was dismissed on the ground of absence of a proper notice to quit, the Court had not only found that the defendants' claim to occupancy rights, on which they sought to resist the plaintiff's second suit for ejectment had not been made out but the District Judge whose was the final decree had, in spite of the dismissal of the suit, awarded the plaintiff his costs against the defendants on the ground that the former had succeeded on the main contention and had failed only on a technical point taken in appeal. The learned Judges, who had to deal with an appeal arising out of the second suit for ejectment, held that in view of the finding on the question of the defendants' claim to occupancy rights having been embodied in the decree, and a decree for the plaintiff's costs against the defendants having been passed on the basis of that finding, it was open to the defendants to file an appeal from the decree and to contest the correctness of the finding in that appeal and that, they having failed to do so, the decision in the previous suit on the question of title did operate as *res judicata*. In the Bombay case although the first suit for ejectment was dismissed for want of proper notice, the decree finally passed expressly declared that the mulgeni lease, which was also relied on by the defendants in the second suit for ejectment, was not binding on the plaintiff and was therefore set aside.

[8] It will thus appear that in all the three cases relied on by the learned counsel for the appellants although the first suit of the plaintiff had been dismissed, the decree contained a declaration negating the claim sought to be set up by the defendants in the subsequent litigation, and it was for this reason that the decision in the previous suit on the question of title was held to debar the defendant from putting forward a similar claim in the subsequent litigation. The cases are, therefore, easily distinguishable from the present case in which the decree was wholly silent about the plea which is sought to be raised by the contesting defendant in the present suit. I am accordingly of the opinion that the decision of the Courts below on the question of *res judicata* is not open to any objection and must be upheld.

[9] It was next contended by the learned counsel for the appellants that although the decision in the previous case may not operate as *res judicata* and may not bar the defendants' plea as to the want of any title in the plaintiffs,

it is at least a very important piece of evidence in support of the plaintiffs' alleged title. In my opinion, the judgment in the previous suit is only relevant under S. 13, Evidence Act for the purpose of proving that at that time there was a successful assertion on the plaintiffs' part of their title to a 1/6 share in the property in dispute. The finding on which the judgment was based or the reasons given by the learned Judge in support of that finding are not relevant. The learned counsel for the appellants drew my attention to certain observations of their Lordships of the Judicial Committee in 48 Cal. 460,⁴ the judgment of the Oudh Chief Court in 1935 O.W.N. 894⁵ and the judgment of their Lordships of the Judicial Committee in A.I.R. 1937 P.C. 69.⁶ After a careful perusal of these judgments, I am of the opinion that they do not go any further and cannot be regarded as any authority for the proposition that a judgment in a previous case whether *inter partes* or otherwise which does not bar the trial of the plea can be used for any purpose other than that of establishing successful or unsuccessful assertion or denial of title by one party or the other. In 11 Pat. 50,⁷ a Division Bench of the Patna High Court of which the present Chief Justice of that Court was also a member held that even a judgment *inter partes* unless it is relevant under ss. 40 to 42, Evidence Act is not admissible in evidence at all so far as regards the matter which it decides but that it may be admissible to prove that a right was asserted or denied under S. 13 of the Act or at best to explain or introduce facts in issue or to explain the history of the case. Similarly, in 55 Mad. 346,⁸ a Bench of the Madras Court held that ss. 40 to 43, Evidence Act deal with the admissibility of a judgment in evidence, and that if a judgment even though it was *inter partes* is not admissible under any of those sections, it must be left out of consideration altogether.

[10] It was not disputed that in so far as the judgment of Mr. Purshotam Lal was relevant under S. 13, Evidence Act, it has been taken into consideration by the learned Senior Subordinate Judge. He has not entirely ruled out that judgment but he was not satisfied that the successful assertion by the plaintiffs of their title to the suit property in the litigation of 1936 was sufficient to prove their alleged title. The question of appreciation of evidence whether oral or documentary is essentially a question for the first Court of appeal and a finding of fact does not become assailable in second appeal merely because, in coming to that finding, the Court of first appeal had to appreciate evidence consisting of a successful assertion of title in a previous case which assertion was relevant under S. 13.

[11] Reference was also made to the circumstance that in the suit of 1927 Lakhmi Chand, the father of defendant 2, had included the serai in dispute in the property which formed the subject-matter of the litigation. Unfortunately, the operative part of the plaint in that case is not available because of the material pages being missing from the record; however, the title of the suit is there and from a perusal of it one finds that even in that suit Lakhmi Chand repudiated the title of Mt. Karam Devi and Mt. Ram Khetri to the serai and claimed that it was his exclusive property and was in his possession as its sole owner. The assertion made by Lakhmi Chand in that suit and his conduct as disclosed by that suit, so far from helping the plaintiffs seem to go very much against them.

[12] For the reasons given above, I am of the opinion that this appeal is without force and dismiss the same with costs.

S.C.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 113 [C. N. 40.]

ACHHRU RAM J.

Fazal Haq and others — Defendants — Appellants v. Mt. Said Nur, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 2439 of 1946, Decided on 23-4-1947, from decree of Dist. Judge, Rawalpindi, D/-18-7-1946.

(a) Evidence Act (1872), S. 35 (5)—Reference to relationship of donee with donor's husband in final order for mutation giving effect to gift—Such recital, if admissible.

In mutation proceedings, it is not the practice to record the statements of the persons appearing before the Revenue Officer in the way in which statements of parties or witnesses are usually recorded in civil or other proceedings. What happens is that the Revenue Officer concerned puts questions to the parties or other persons present before him and embodies the answers elicited in the order recorded by him. Hence, where the reference to the relationship of the donee with the husband of the donor is not contained in the report made by the donor to the patwari at the time the mutation in respect of the gift was entered, but is to be found only in the final order passed by the Revenue Officer, it cannot be said that S. 32 (5) is inapplicable in such a case. If such a reference to the relationship in the final order of the Revenue Officer did not embody a statement made by the donor it must in any case be deemed to incorporate the result of an enquiry made by the said officer at the time of the attestation of the mutation and for the purpose of ascertaining if any genuine transfer had taken place to which effect must be given by means of mutation. In that case, the recital with regard to such relationship can be held to be relevant under S. 35.

[Para 5]

(b) Custom (Punjab) — Succession — Donee, a female, dying leaving husband—Gifted property, if reverts to donor's line.

While a widow has generally been held to represent the estate of her husband, there is no authority for the view that a husband in the same manner represents the estate of his wife after the latter's death. Custom cannot

be proved by means of a process of logical reasoning and merely because the widow of a donee is entitled to succeed to the gifted property and reversion to the donor's line is postponed during the lifetime of such a widow, it cannot be held that there can be no reversion of the donated property to the donor's line where the donee happens to be a female who has left a husband surviving her so long as her husband is alive. [Para 10]

(c) Custom (Punjab)—Succession — Agricultural tribes—Cognates—Death of sonless proprietor—No agnates—Any cognate, male or female can succeed —Adopted son not cognate—Right of such cognate to challenge alienation by widow.

Among the agricultural tribes of the Punjab generally, in the absence of all agnates of a childless proprietor any cognate, whether male or female, however distantly related to him, is entitled to succeed to his property in preference to a stranger. Such a cognate when he or she has the right to succeed can also contest the validity of any alienation that may have been effected by widow in possession on the usual life-tenure: 27 A. I. R. 1940 Lah. 416, *Foll.* [Paras 8, 9]

A son adopted under custom is not such a cognate as such an adoption creates only a personal relationship between the adoptor and the adoptee and does not make the latter a descendant of any of the ancestors of the former. [Para 8]

(d) Custom (Punjab) — Adoption — Status of adoptee.

A son adopted under custom is not a cognate because a customary appointment as an heir creates merely a personal relationship between the appointer and the appointee and does not make the latter a descendant of any of the ancestors of the former. [Para 8]

(e) Custom (Punjab) — Succession — Widow's right to collateral succession—Husband appointing heir—Effect (*Obiter*.)

Obiter — Since the answer to Question 24 in the Customary Law of the Rawalpindi District gives a widow the right of collateral succession only where she has succeeded to the estate of her husband, it is difficult to hold that the statement of the custom in the aforesaid question and answer confers on a widow a right of collateral succession also even in a case where, by reason of her husband having appointed an heir, she is excluded from succession to his own estate. [Para 11]

Cases referred :—

1. ('41) I. L. R. (1941) Lah. 546 : 27 A.I.R. 1940 Lah. 416 : 191 I. C. 422, *Tara Singh v. Suraj Kaur*.
2. ('44) 31 A. I. R. 1944 Lah. 353, *Mt. Chameli v. Ram Saran*.

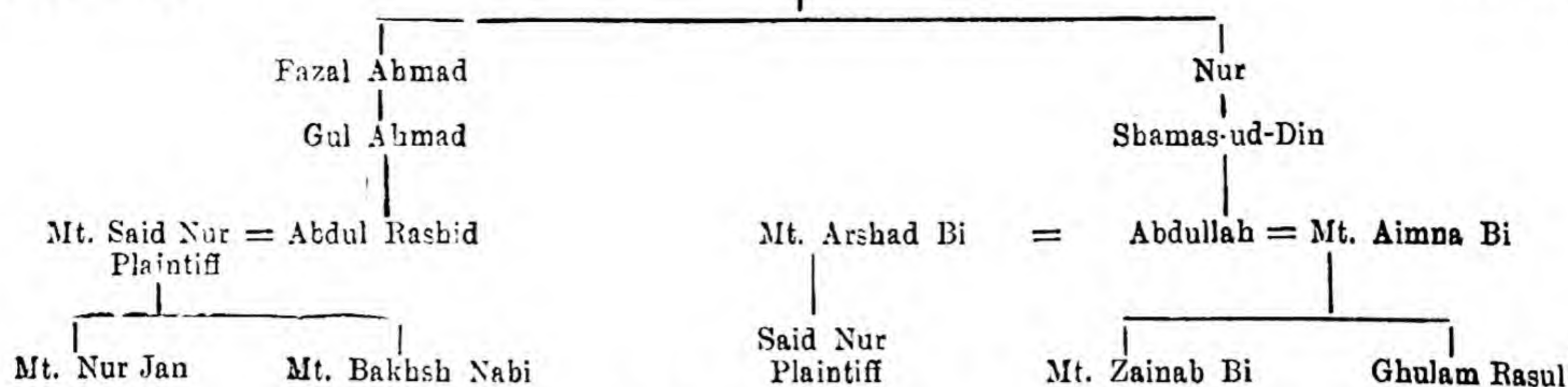
Gurbachan Singh and D. N. — for Appellants.

Shamair Chand and Parkash Chand Jain —
for Respondents.

Judgment. — The following pedigree table will be of assistance in understanding the facts of this case :

(See pedigree on page 114.)

Abdul Rashid adopted Abdul Ghani who is still alive. Abdullah died in the year 1916 leaving him surviving a widow, Mt. Aimna Bi and a daughter from the aforesaid Mt. Aimna Bi by the name of Mt. Zainab Bi, who was married to Fazal Haq, defendant 1. The plaintiff Mt. Said Nur also claims to be a daughter of Abdullah. At the time of her husband's death, Mt. Aimna Bi was pregnant. Mutation in respect of the



land left by Abdullah was sanctioned in favour of Mt. Aimna Bi. A few months after the mutation, she gave birth to a son, who was named Ghulam Rasul. The land of Abdullah was, on the birth of Ghulam Rasul, mutated in the name of the aforesaid Ghulam Rasul. In 1924, on the death of Ghulam Rasul, the land was re-mutated in the name of Mt. Aimna Bi. In 1933, Mt. Aimna Bi gifted 17 *kanals* and 12 *marlas* of land out of the land inherited by her on the death of her son Ghulam Rasul to Mt. Zainab Bi. On 5th February 1938, she gifted another 50 *kanals* and 8 *marlas* of land and a house in favour of the aforesaid Mt. Zainab Bi. She also executed a will in favour of her son-in-law Fazal Haq regarding the rest of the property in her possession. Besides the aforesaid transfers by way of gift, Mt. Aimna Bi sold 2 *kanals* and 1 *marla* of land to Hukam Dad, father of defendants 2-4 and Jahan Dad defendant 5. A suit for the usual declaration in respect of this sale was brought by Abdul Rashid and was decreed on 19th March 1925. In August 1925, Mt. Aimna Bi sold another 1 *kanal* and 19 *marlas* of land to Fazal Haq, defendant 1. In respect of that sale also, Abdul Rashid obtained a declaratory decree. On 19th December 1937, 1 *kanal* and 7 *marlas* of land was sold by Mt. Aimna Bi to one Sunna now represented by Mahbub Alam, defendant 7. Certain other sales were also effected by the aforesaid Mt. Aimna Bi.

[2] Mt. Zainab Bi, the daughter of Mt. Aimna Bi died on 25th February 1940. Abdul Rashid had died about the year 1930 and had been succeeded by his adopted son Abdul Ghani.

[3] Mt. Aimna Bi died in March 1940. On 29th December 1941, mutation in respect of the land that had been left undisposed of by her was attested in favour of Fazal Haq, defendant 1 on the strength of a will made by Mt. Aimna Bi in his favour.

[4] The present suit was instituted by Mt. Said Nur in 1943 for possession of 104 *kanals* and 12 *marlas* of land including the land that had been transferred by Mt. Aimna Bi at different times, by means of the gifts and the sales mentioned above, in favour of the various defendants and also for possession of the house

gifted to Mt. Zainab Bi on 5th February 1938. By a statement made on 3rd August 1944, the plaintiff withdrew her suit in respect of 29 *kanals* and 8 *marlas* of land covered by sales other than the three sales mentioned above in respect of two out of which a declaratory decree had already been obtained by her husband. On the pleadings of the parties, the following issues were framed by the learned trial Judge :

(1) Whether the plaintiff is the daughter of Abdullah deceased and as such the sister of Ghulam Rasul, the last male-holder ?

(2) If issue No. 1 is found in plaintiff's favour then is she not entitled to inherit the estate of Ghulam Rasul deceased ?

(3) Is Mt. Aimna Bi governed by agricultural custom of the province in matters of succession and alienation ?

(4) Is the plaintiff entitled to inherit by way of collateral succession ?

(5) If issues Nos. 1 and 3 are found in favour of the plaintiff then had Mt. Aimna Bi an unrestricted power of alienation ?

(6) If issue No. 5 is found against the defendants then what is its effect ?

(7) Is the suit within time ?

(8) Was the property originally owned by Abdullah or his ancestors ?

(9) If issues Nos. 3, 5 and 8 are found in the affirmative then did not property in suit revert to Mt. Aimna Bi on the death of Mt. Zainab Bi without issue ?

(10) Did Mt. Aimna Bi make a valid will in favour of Fazal Haq or Zainab Bi ?

(11) Did Abdul Rashid the plaintiff's husband obtain the decrees alleged in para. 13 of the plaint ? If so, what is their effect ?

(12) Were the alienations mentioned in para. 14 of the plaint made for consideration and legal necessity ?

(13) Relief.

The first issue was decided in the plaintiff's favour. On the second issue, it was held that the plaintiff, although a half sister of Ghulam Rasul, was, in the absence of nearer heirs, entitled to the property of the aforesaid Ghulam Rasul after the death of his mother. The third issue was decided in the plaintiff's favour. On the fourth issue, it was held that even if the plaintiff were not held to be a daughter of Abdullah, she had a right to succeed to the property in dispute as the widow of Abdul Rashid, the right of a widow to succeed collaterally being fully recognised by the custom applicable to the parties. The fifth issue was decided against the defendants. The sixth issue in consequence did

not arise. The seventh issue was also decided in the plaintiff's favour and it was held that applying Art. 141, Limitation Act, the suit was well within time. On the eighth issue, it was held that the property in dispute did originally belong to Abdullah. The ninth issue was decided in the plaintiff's favour and it was held that on Mt. Zainab Bi's death without any issue, male or female, the property gifted to her by her mother, Mt. Aimna Bi reverted to the latter. The tenth issue was decided against the defendants. On the eleventh issue, it was held that the plaintiff's husband had obtained declaratory decrees in respect of two of the sales effected by Mt. Aimna Bi, one in favour of the father of defendants 2-4, and defendant 5 and the other in favour of defendant 1. Under the twelfth issue, it was held that the sale of 1 *kanal* and 7 *marlas* of land by Mt. Aimna Bi in favour of the predecessor-in-title of defendant 7 made on 19th December 1937, which was the only alienation left in respect of which the question of consideration and necessity had to be determined had been proved to have been effected for legal necessity and was accordingly valid and binding on the plaintiff. As a result of these findings, the plaintiff's suit was dismissed in respect of 30 *kanals* and 15 *marlas* of land described as comprised in *khasra* Nos. 1720, 479, 482, 455, 460, 476, 481 and 3412/1677. Her suit, however, was decreed in respect of the remaining land which formed the subject-matter of the suit and the house. The defendants appealed to the learned District Judge, who affirmed all the findings of the learned trial Judge and upheld the decree passed by him. They have come up in second appeal to this Court.

[5] The concurrent finding of the two Courts below as to the plaintiff having been proved to be a daughter of Abdullah and a half-sister of Ghulam Rasul is a finding of fact and after hearing the learned counsel for the appellants, I see no reason to interfere with it. Being a finding of fact supported by evidence, it should normally be binding on me. The learned counsel for the appellants, however, contended that it was vitiated by reason of the learned District Judge having taken into consideration, in arriving at this finding, irrelevant evidence. It was urged that the reference to the plaintiff as a daughter of Abdullah in the mutation order of which the copy is Ex. P-25, was not contained in any statement made by Mt. Aimna Bi which could be held to be admissible in evidence under S. 32, sub-s. (5), Evidence Act. It is true that the reference to the relationship of Mt. Said Nur, the donee, the gift in whose favour was sought to be given effect to by means of the aforesaid mutation, with Abdullah is not contained in the re-

port made by Mt. Aimna Bi to the Patwari at the time the mutation was entered and is to be found only in the final order passed by the Revenue Officer where it is said that Mt. Aimna Bi had admitted having gifted the property to Mt. Said Nur, daughter of Abdullah. In mutation proceedings, it is not the practice to record the statements of the persons appearing before the Revenue Officer in the way in which statements of parties or witnesses are usually recorded in civil or other proceedings. In fact, so far as I am aware, there are definite instructions against statements being so recorded in such proceedings. What happens is that the Revenue Officer concerned puts questions to the parties or other persons present before him and embodies the answers elicited in the order recorded by him. The only reasonable inference that can be drawn from the final order of the Revenue Officer sanctioning the mutation is that Mt. Aimna Bi when questioned about the gift had stated before him that she had in fact gifted the property to Mt. Said Nur, who was a daughter of her husband Abdullah. I see no reason to hold S. 32, sub-s. (5), Evidence Act, to be inapplicable to the case.

[6] If the reference to the relationship of Mt. Said Nur with Abdullah in the final order passed by the Revenue Officer did not embody a statement made by Mt. Aimna Bi it must in any case be deemed to incorporate the result of an enquiry made by the said officer at the time of the attestation of the mutation and for the purpose of ascertaining if any genuine transfer had taken place to which effect must be given by means of mutation. In that case, the recital with regard to such relationship can be held to be relevant under S. 35, Evidence Act.

[7] I am accordingly of the opinion that the learned District Judge did not in reaching the conclusion that the plaintiff had been proved to be the daughter of Abdullah rely on any inadmissible evidence. The concurrent finding given by the two Courts below, therefore, is wholly unassailable and must be upheld.

[8] In I.L.R. (1941) Lah. 546¹ a Division Bench of this Court held that among the agricultural tribes of the Punjab generally, in the absence of all agnates of a childless proprietor, any cognate, whether male or female, however distantly related to him, is entitled to succeed to his property in preference to a stranger. It is not disputed that no agnate of Ghulam Rasul was in existence at the time of the death of Mt. Aimna Bi. Abdul Ghani, the adopted son of Abdul Rashid, cannot be admitted as such an agnate because it is well settled that a customary appointment as an heir creates merely a personal relationship between the appointer and the

appointee and does not make the latter a descendant of any of the ancestors of the former. It is also not disputed that no nearer cognate of Ghulam Rasul, the last male holder, other than Mt. Said Nur plaintiff, his half sister, was in existence at that time. In the circumstances, in view of the authority just adverted to, the plaintiff has an undoubted right to succeed to the property held by Mt. Aimna Bi which she had inherited from her son Ghulam Rasul.

[9] The judgment of the Division Bench quoted by me above is also authority for the view that such a cognate when he or she has the right to succeed can also contest the validity of any alienation that may have been effected by a widow in possession on the usual life-tenure.

[10] Exception was taken by the learned counsel for the appellants to the finding of the learned District Judge as to the land gifted by Mt. Aimna Bi in favour of Mt. Zainab Bi having reverted to the former on the latter's death without any issue. He referred to a judgment of this Court in A. I. R. 1944 Lah. 353² in which it has been held that the widow of a donee is entitled to succeed to the property gifted and that during her lifetime there can be no reversion of the donated property to the line of the donor. It was urged that the analogy of this case should apply to a case where the donee happens to be a female who leaves a husband surviving her and that there can be no reversion to the donor's line so long as the husband of the donee is alive. While a widow has generally been held to represent the estate of her husband, there is no authority for the view that a husband in the same manner represents the estate of his wife after the latter's death. It is true that according to the general custom of the province as stated in para. 270 of Rattigan's Digest of Customary Law, a husband has a right to succeed to the property held by his wife absolutely on her death without any children. The land in dispute, however, was not so held by Mt. Zainab Bi, the gift in her favour having been made by a widow who had merely a life-estate in the property gifted. Custom cannot be proved by means of a process of logical reasoning and merely because the widow of a donee is entitled to succeed to the gifted property and reversion to the donor's line is postponed during the lifetime of such a widow, it cannot be held that there can be no reversion of the donated property to the donor's line where the donee happens to be a female who has left a husband surviving her. I accordingly see no reason to differ from the conclusion reached by the learned District Judge on the subject.

[11] The learned District Judge, agreeing with the learned trial Judge, has also held that in

case the plaintiff is not proved to be a daughter of Abdullah, as the widow of Abdul Rashid she has a right to succeed to the property in dispute by reason of a widow's right of collateral succession being fully recognised in the tribe of the parties. In view of my decision on the question of the plaintiff's relationship with Abdullah, I do not find it necessary to give any decision on this question. I must, however, say that in view of the fact that Abdul Rashid has left an adopted son having the right to succeed to his own property, it is at best questionable whether, in view of the answer to question 24 in the Customary Law of the district, Mt. Said Nur could be said to have any right to succeed to the property left by the collaterals of Abdul Rashid. It is quite true that Abdul Ghani as the appointed heir of Abdul Rashid has no right to succeed collaterally in Abdul Rashid's family. However, the answer to question 24 gives a widow the right of collateral succession only where she has succeeded to the estate of her husband and it should be difficult to hold that the statement of the custom in the aforesaid question and answer confers on a widow a right of collateral succession also even in a case where, by reason of her husband having appointed an heir, she is excluded from succession to his own estate.

[12] It was next urged by the learned counsel that khasra No. 466 comprising an area of 5 kanals and 18 marlas was included in the land covered by the sale-deeds in respect of which the plaintiff had withdrawn her suit on 3-8-1944 and that the aforesaid land had been wrongly decreed in the plaintiff's favour. On a reference to the plaint, I find that this contention of the learned counsel for the appellants is well founded. In para. 14 khasra No. 466 is mentioned as included in the land sold by Mt. Aimna Bi and, in the statement made by the plaintiff on 3-8-1944, she expressly withdrew her suit in respect of the sales mentioned in the aforesaid paragraph.

[13] On a reference to the Jamabandi and the plaint, however, I find that the area of the land comprised in the khasra numbers which have been mentioned in the judgment of the learned trial Judge while dismissing the suit in part comes only to 24 kanals and 17 marlas. If 5 kanals and 18 marlas, the area of khasra No. 466 is added, it gives us exactly 30 kanals and 15 marlas in respect of which the suit of the plaintiff has been dismissed by the two Courts below. Under the circumstances, it appears to me that the area of the land in respect of which the plaintiff's suit was to be dismissed has been correctly given in the decree but khasra No. 466 has been excluded by oversight in enumerating the khasra numbers of the land possession of which was not being decreed.

[14] For the reasons given above, I allow this appeal only to the extent of modifying the decree passed by the learned District Judge in the plaintiff's favour by including in the list of the khasra numbers in respect of which the plaintiff's suit has been dismissed khasra No. 466. The defendants having failed except to the extent of the rectification of a clerical mistake in the judgment and the decree, I award the respondents 3/4th of the costs of this Court against the appellants. The costs of the Courts below shall be borne as directed by the said Courts.

S.C.

*Decree modified.***A. I. R. (35) 1948 Lahore 117 [C. N. 41.]**

BHANDARI J.

Dina Nath Balik Ram v. Emperor.

Criminal Appeal No. 1103 of 1946, Decided on 28-4-1947, from order of Sessions Judge, Hoshiarpur, D/-22-11-1946.

Penal Code (1860), S. 103—Private defence of property—Limits of.

The accused was the owner and was in possession of a plot of land and had sown the crop. Certain persons, the kumhars, were recorded as occupancy tenants of the land. The kumhars resorted to every device for obtaining possession of the land but failed. They then decided to take possession by force. They collected a large number of persons armed with *lathis* including an enemy of the accused and the deceased, a hot tempered young man of a dubious character. They proceeded to the spot armed with *lathis* with the avowed object of uprooting the crop and taking possession by force. The deceased began to yoke the bullocks to the plough in spite of the protests of the accused when the accused struck him with spear as a result of which he died. The accused pleaded a right of private defence of property:

Held that in the circumstances of the case the accused did not exceed his right of private defence; the accused was entitled to defend his property and as he knew that in defending property he was in danger of receiving grievous hurt he was justified in attacking the deceased. The accused was justified in carrying the force to the extent of killing one of the trespassers, who had come to take forcible possession.

[Paras 12 and 13]

Cases referred:—

1. (1904) 10 Bur. L. R. 263 : 1 Cr. L. J. 997, Emperor v. Kyaw Zan Hla.
2. (1865) 2 W. R. 43 Cr., Queen v. Pelkoo Nushyo.
3. (1926) 6 Lah. 463 : 13 A. I. R. 1926 Lah. 28 : 91 I.C. 70 : 27 Cr. L. J. 38, Ismail v. Emperor.

R. C. Soni and Durga Das—for Appellant.

Balraj Tuli for Advocate-General—for the Crown.

Judgment.—Dina Nath, a resident of the Hoshiarpur District, has been found guilty under S. 304, Part 1, Penal Code, and sentenced to four years' rigorous imprisonment. He is dissatisfied with the order of the Court below and has come to this Court in appeal.

[2] The facts of the case are fairly simple. It appears that a plot of land measuring about eleven *kanals* belonging to the appellant was

being cultivated by certain occupancy tenants who sub-let it to a person by the name of Beli. The Kumhars, who are the occupancy tenants, had a notice of ejectment issued against this Beli but as Beli made no reply, a warrant of ejectment was issued by the Tahsildar. This warrant is said to have been executed on the 16th May 1946, when the occupancy tenants were formally put in possession of the land. Four days later i. e. on 20th May 1946, the appellant went to this land, gave a beating to the Kumhars and turned them out. The latter brought a complaint under Ss. 447 and 323, Penal Code.

[3] At about 2 o'clock on the afternoon of 21st June 1946, the Kumhars went in a body to the plot of land bearing Khasra No. 1650 in order to plough the Chari crop they had themselves grown and to sow the field with rice. Shortly after they had reached this field the appellant came rushing along on the back of a mare armed with a spear. He alighted from the mare, went up to the occupancy tenant who was yoking the bullocks to the plough and asked him not to plough the land. The tenant stepped aside but Chet Ram deceased, a Rakha of the village who had accompanied the party of Kumhars, expressed his determination to plough the field. He got hold of the bullocks and was about to put it under the plough when the appellant ran towards him and plunged his spear into his chest. The Kumhars raised an alarm on hearing which a number of Chang boys, who were grazing their cattle near the place of occurrence, appeared on the scene armed with *lathis* and endeavoured to snatch the spear from the hands of the appellant. It is said that they inflicted as many as twenty injuries on the person of the appellant when the latter jumped on to his mare and galloped off into the distance. The spear which had fallen on the ground was snatched by one of the witnesses and later produced before the police.

[4] The prosecution story out-lined above has been corroborated by the testimony of a number of witnesses including Dhanna, Jagat Ram and Mast Ram Kumhars who claim to be the occupancy tenants, Nakel, Dhani Ram, Mangat Ram and Jagat Ram, the four Chang boys, who came to the spot on hearing the cries of the Kumhars, and by the evidence of Brahm Dass Lambardar of the village who witnessed the occurrence with his own eye.

[5] The appellant has given a story of his own. He states that his father was the owner of a large tract of land which was being cultivated by occupancy tenants. One of these tenants by the name of Pohlo died many years ago and disputes at once arose as to whether the occupancy rights had devolved on the landlords or whether

they had devolved on the relations of Pohlo. The differences between the parties were later composed and it was agreed that a plot of land measuring about 11 kanals 8 marlas should be made over to the landlords and that the rights of occupancy in the said plot should be held to be extinguished. In the year 1915 the Kumhars applied for partition of this plot of land but the father of the appellant stated before the Court that a compromise had been reached according to which he was the owner of the land and that the occupancy tenants had no right or interest in the said land. From the year 1915 to the date of the occurrence this plot of land continued to remain in the possession of the family of the appellant although the Kumhars continued to be shown as occupancy tenants. In 1944 Khushia was shown to be in cultivating possession as a tenant under the appellant and in Kharif 1945 Beli was shown as a tenant. In the year 1946 the appellant cultivated the entire land himself. The Kumhars, however, entered into a conspiracy with the patwari and had a notice of ejectment issued against Beli. A warrant of ejectment was later issued by the tahsildar and a fictitious report made by the Girdawar that the possession of land had been delivered to the Kumhars. In regard to the incident which took place on the day of occurrence the appellant states that he was sitting on a charpoy along with his mother and a little girl when 20 or 25 men came to the spot and started uprooting the crop. He and his mother objected to their conduct whereupon the deceased and his companions opened an assault on the objectors. As a result of this assault both the appellant and his mother received injuries of varying severity. Apprehending danger to their lives the appellant thrust his spear into the body of the deceased in exercise of his right of private defence.

[6] The learned Sessions Judge came to the conclusion that the land in dispute had always been in the possession of the appellant or his father Balak Ram, that the warrant of ejectment which is said to have been issued by the tahsildar was not executed by the revenue authorities and that the crop which the Kumhars had come to uproot had really been sown by and was the property of the appellant. He held further that the appellant came to the spot on the back of a mare, that he asked the Kumhars to desist from ploughing the land, that one of the Kumhars, who was about to yoke his bullock, stepped aside and that Chet Ram deceased who was a fire-brand of the village, expressed his determination to plough the land, that the latter was about to put the bullocks to the plough when the appellant rushed towards him with a spear and plunged his weapon into the chest of the un-

fortunate man, and that a number of Chang boys who were grazing their cattle nearby came to the scene of the outrage and inflicted as many as 22 injuries on his person. In view of these findings the learned Sessions Judge expressed the view that the mere fact that some of the Kumhars and others were armed with lathis was not by itself sufficient to indicate that the appellant must have apprehended grievous injury to himself. Admittedly the appellant was more or less alone and the Kumhars had collected a number of persons to help them but they were not primarily interested in beating him so long as they could get possession otherwise. The learned Sessions Judge accordingly held that the appellant had exceeded his right of private defence.

[7] While I am in general agreement with the findings of the learned Sessions Judge, I regret I am unable to endorse the view that the injuries appearing on the person of the appellant were received after he had himself struck the fatal blow on the person of the deceased. Three witnesses, namely, a servant and the mother of the appellant and one Gopal Singh have appeared to support the appellant's story. The servant and the mother are apparently interested in the appellant but I can see no reason for regarding Gopal Singh as being an interested witness. The story for the prosecution has been supported by the Kumhars who are directly interested in the dispute, by one Brahm Dass who has reasons to be inimical towards the appellant and by the four Chang witnesses who are tenants of Brahm Dass. Upon a review of all the evidence in this case I am left in reasonable doubt whether (even if the story of the appellant cannot be accepted at its face value) the appellant received the injuries before he himself delivered the mortal blow. Giving the appellant the benefit of the doubt which has arisen, I would hold that the appellant was injured by the deceased and his companions before he himself wielded his spear in exercise of his right of private defence. Even if the facts were as found by the learned Sessions Judge, viz., that the appellant was the first to open the assault, it seems to me that in view of the provisions of S. 103, Penal Code, his right of private defence of property extended to the voluntary causing of death.

[8] Before I proceed to examine the strictly legal consequences which flow from the enactment of S. 103, Penal Code, it may perhaps be desirable to refer to certain observations which were made by the eminent persons who were entrusted with the onerous duty of drafting the said Code.

[9] The law Commissioner said:

"In this part of the chapter we have attempted to define with as much exactness as the subject appears to

us to admit, the limits of the right of private defence. It may be that we have allowed too great a latitude to the exercise of the right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people accustomed to take the law into their own hands, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang-robbers and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable and at the same time one of the most discouraging symptoms which the state of the society in India presents to us. Under these circumstances, we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation resisting a body of dacoits."

[10] Section 97, Penal Code, declares that every person has a right to defend the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. Section 103 justifies homicide in case of (1) robbery, (2) house-breaking by night, (3) arson and (4) theft, mischief or house-trespass causing apprehension of death or grievous hurt. This right is, however, subject to the two limitations contained in S. 99, namely, that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities and that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

[11] The first question arising in this appeal is a very short one. It is said that as soon as the appellant was informed that the Kumhars and their companions were about to take possession of the land by the use of force he should have taken recourse to official aid, for a person who can get relief by recourse to law is not at liberty to take the law into his own hands. There is not an iota of evidence on the record to justify the conclusion that the appellant knew beforehand of the intention of the Kumhars to take forcible possession of the land by uprooting the crop belonging to him. On the other hand, the circumstances indicate that the appellant was informed of the intention of the Kumhars after they had actually reached the spot. It was then that he jumped into the saddle and rushed to the scene of the occurrence armed with a spear. It was of course, open to him to stand aside as a disinterested spectator, to allow the Kumhars to

uproot the crop grown by him and to take possession of the land belonging to him, but it could not have been the intention of the legislature that a person in actual possession of property should meekly submit to being ousted therefrom in the vain hope of being able to obtain redress by means of a lengthy and expensive civil suit. Section 97, Penal Code, has conferred a very clear and distinct right on every person to resist aggression and a recourse to the help of the State can be insisted on only when there is time to obtain such help. In view of the sudden nature of the attack in this case I am of the opinion that the appellant was justified in standing his ground and preventing the Kumhars from carrying out their designs.

[12] The second and perhaps the more important question is whether the appellant, who was undoubtedly entitled to use force against the aggressors was justified in carrying this force to the point of killing one of them. I have held in an earlier paragraph that the appellant received certain injuries on his person before he was himself attacked and it may thus be assumed that he had a reasonable cause for apprehending that death or grievous hurt would be the consequence if he did not deal out a blow with the spear with which he was armed. He was thus fully justified in voluntarily causing the death of the assailant.

[13] Even if the finding of the learned Sessions Judge that the appellant thrust his spear into the chest of the deceased when the latter was merely putting the bullocks under the plough were accepted, even then it seems to me that he did not exceed his right of private defence. The facts and circumstances of the case make this quite clear. The land was admittedly the property of the appellant and he had grown a *chari* crop on that land. The Kumhars who were occupancy tenants under the appellant had resorted to every possible device for obtaining possession of the land, but had failed. They accordingly decided to achieve by force what they had failed to achieve by other means. They got together a large number of men and proceeded to the spot armed with lathis with the avowed object of uprooting the crop and taking possession of the land. They took particular care to take with them one Brahm Das an enemy of the appellant and Chet Ram, deceased, a hot-tempered young man of the village and a friend of Brahm Das. The deceased was running a grocer's shop in Saido which he had built on the land belonging to Brahm Das. About a year prior to the occurrence he was arrested by the police under S. 109, Criminal P. C., but was discharged by the Court on the evidence of Brahm Das. He was living openly with a married woman and had probably

been guilty of an offence under S. 498, Penal Code. I am not surprised therefore that when the appellant appeared on the scene and saw a large number of persons (including his sworn enemies) collected at the spot and when he saw that most of them were armed with lathis he honestly believed that they had come to the spot with the avowed object of taking forcible possession of the land and that he was in imminent danger of receiving grievous hurt if he did not use his spear. It was, of course, open to him to run away like a coward and to escape injuries to himself but, as pointed out elsewhere in the judgment, it could not be the intention of the Legislature that the person in possession of property should abandon it to the mercy of the trespasser as soon as the latter threatens to attack his possession. The appellant was, in my opinion, entitled to defend his property and as he knew that in defending that property he was in danger of receiving grievous injuries, he was, in my opinion, justified in attacking the deceased. In 1 Cr. L. J. 997 : 10 Bur. L. R. 263¹ it appeared that the thieves had entered the accused's plantation and had stolen sugarcane therefrom. He waited and watched one night from sunset and heard the foot-steps of a thief who had entered the plantation by cutting away his fencing with a dao. He then heard the sounds of sugarcane being cut, and he aimed with a cross bow in the direction of the sound and shot. The bolt hit the thief and he died. The learned Judges held that as to reasonable apprehension of death or grievous hurt, that if in defending property against a thief, the defender is under a reasonable apprehension of being killed or grievously hurt unless he causes the death of the thief, then he is entitled to cause his death or take the risk of doing so, that it cannot mean that a man may not cause the death of a thief, if by abstaining from defence at all, he can avoid the apprehension of death or grievous hurt; that as the thief was using a dao to cut the sugarcane and that as the accused heard him doing so, it was reasonable for the accused to apprehend that if he went near enough to drive away the thief, the thief would resist him with a dao and cause either death or grievous hurt and that therefore, the accused was justified in defending his property, in shooting an arrow or bolt at the thief, and with a deadly weapon not actually intending to kill, but knowing it to be likely that he would kill him, and the law does not make any distinction as to the nature of the weapon that may be used. They held further that in the circumstances the accused had not inflicted more harm than was necessary, that in these cases the circumstances must be considered, and the law should be construed liberally in favour of the

accused if he acted in good faith for the protection of his life and property. A similar view was taken in 2 W. R. 43² and 6 Lah. 463.³

[14] For these reasons it seems to me that the prosecution have not been able to bring the charge home to the appellant beyond reasonable doubt. I would accept the appeal, set aside the order of the Court below and direct that the appellant be acquitted.

G.B.

Appeal allowed.

A. I. R. (35) 1948 Lahore 120 [C. N. 42.]

BHANDARI AND MOHAMMAD SHARIF JJ.

Ahmad Khan and others—Convicts—Petitioners v. Emperor.

Criminal Misc. Case No. 1078 of 1946, Decided on 14-3-1947, referred by Mohd. Sharif J., D/- 10-9-1945.

(a) Government of India Act (1935), S. 107 — Repugnancy — Test.

It is too narrow a test to say that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says 'do' and the other 'don't'. There may well be cases of repugnancy where both laws say 'don't' but in different ways. The true test is that if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and, therefore, inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law. [Para 8]

(b) Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance (Punj. 2 [II] of 1946), S. 2 — Ordinance if inconsistent with Government of India Act, 1870.

Though the Frontier Crimes Regulation, 1901, was passed in exercise of the powers conferred by the Government of India Act, 1870, and was not applicable to the Mianwali district and the Act of 1870 contemplated that Regulations should be promulgated by the Governor-General only, the Ordinance of 1946 cannot be said to be inconsistent with the Government of India Act on the ground that it extends the Regulation of 1901 to the Mianwali district and was passed by the Governor of the Punjab. The reason is that the Act of 1870 having been repealed by the Government of India Act, 1935, has ceased to exist and the Regulation of 1901 is continuing in force under S. 276, Government of India Act, 1935, which has conferred powers on the Central and Provincial Legislatures to legislate in their respective spheres and these powers are as plenary and as ample within the limits prescribed in the statute as the Parliament itself possesses. [Para 11]

(c) Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance (Punj. 2 [II] of 1946), S. 2 — Ordinance if repugnant to Frontier Crimes Regulation, 1901.

By making the provisions of the Frontier Crimes Regulation 1901 applicable to only six districts of Peshawar, Kohat, Hazara, Bannu, Dera Ghazi Khan and Dera Ismail Khan, the Legislature evinced its intention of occupying only a part of the field. It made no provision for the other districts. The Governor of the Punjab was thus justified in extending it to the Mianwali district. The Regulation of 1901, which applies to the six districts and the Ordinance of 1946 which applies to the district of Mianwali alone, can,

stand together. There can thus be no inconsistency or repugnancy between the two. [Para 12]

(d) Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance (Punj. 2 [II] of 1946), S. 2 — Ordinance if repugnant to Criminal P. C.

Sections 1 (2) and 5, Criminal P. C., make it clear that if a special form of procedure has been prescribed by any special or local law for the time being in force, it is that procedure which must be followed; if no such procedure has been prescribed, the trial must be regulated by the procedure set out in the Criminal Procedure Code. In other words, an alternative procedure has been expressly authorised by the Code itself. It follows as a corollary that the Code had left the field clear for the promulgation of the Punjab Ordinance of 1946. There is no repugnancy between the Code and the Punjab Ordinance and both of them can continue to exist side by side. [Para 13]

(e) Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance (Punj. 2 [II] of 1946), S. 2 — Ordinance if *intra vires* the Governor—Validation of Orders passed under S. 21 or S. 29, Frontier Crimes Regulation, 1901 — Validity—Government of India Act, 1935, Sch. 7, List I, Items 17, 29, 30.

Except in so far as the Punjab Ordinance, II of 1946, endeavours to validate acts which could be validated only by the Federal Legislature, the said Ordinance is *intra vires* the Governor of the Punjab and could be promulgated by him. [Para 18]

Admission into and emigration and expulsion from British India fall under Item 17, List I and arms, firearms, ammunition and explosives fall under Items 29 and 30, List I, Sch. 7, Government of India Act, 1935, and hence the Governor of the Punjab had no power to promulgate an Ordinance in regard to these matters. Hence the Punjab Ordinance of 1946 in so far as it deals with these matters and validates orders passed under S. 21 or S. 29, Frontier Crimes Regulation, 1901, must be deemed to be repugnant to the provisions of the Government of India Act, 1935. [Paras 14, 18]

(f) Interpretation of Statutes—Validating Act — Object.

The object of a validating Act is to enable parties to carry into effect that which they have designed and attempted but which has failed of its expected legal consequences only by reason of some statutory disability or irregularity in their action. By their very nature such Acts operate on conditions already existing. They can validate acts which the Legislature could have authorised—not those which it could not. [Para 14]

(g) Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance (Punj. 2 [II] of 1946), S. 2 — Retrospective operation — Validity.

There can be no legal objection to an Ordinance being allowed to operate retrospectively. The general rule that no statute should be construed so as to have a retrospective operation unless its language is such as to require such a construction has no application to Validating Acts which by their very nature are intended to act upon past transactions and are, therefore, necessarily retrospective. The powers of a Governor to make Ordinances are as wide as the powers of a Provincial Legislature to make laws, and there is no reason why he should not be at liberty to promulgate retroactive Ordinances having the effect of reopening transactions which had been adjudicated upon by Courts of law and were past and closed: 31 A. I. R. 1944 F. C. 1, *Rel. on*; *Obiter dictum* of Zafrulla Khan J. to the contrary in 30 A. I. R. 1943 F. C. 75, *Dissent*. [Paras 15, 17]

Cases referred :

1. ('45) 32 A. I. R. 1945 Lah. 65 : 222 I. C. 28 : 47 Cr. L. J. 243 (F.B.), *Hari Singh v. Emperor*.
2. ('39) 26 A. I. R. 1939 Cal. 628 : 184 I. C. 689, *Stewart v. Brojendra Kishore*.
3. ('43) 30 A. I. R. 1943 F. C. 75 : I. L. R. (1943) Kac. F. C. 103 : 1944 F. C. R. 1 : 211 I. C. 241 : 45 Cr. L. J. 341 (F.C.), *Emperor v. Shibnath Banerjee*.
4. ('44) 31 A. I. R. 1944 F. C. 1 : I. L. R. (1944) Kac. F. C. 8 : I. L. R. (1944) Nag. 300 : 1944 F. C. R. 61 : 211 I. C. 556 : 23 Pat. 159 : 45 Cr. L. J. 413 (F. C.), *Piara Dusadh v. Emperor*.

Gopal Singh — for Petitioners.

Nand Lal Salooja for Advocate-General —
for the Crown.

Bhandari J. — These petitions raise a question of general importance concerning the administration of criminal justice in a large area of land comprised within the district of Mianwali. On 3-4-1946 a Full Bench of this Court* came to the conclusion that the Frontier Crimes Regulation, 1901, does not apply to the district of Mianwali. As a result of this decision, a learned Judge of this Court took the view that the convictions of persons who had been convicted and sentenced under the Regulation of 1901 were void. He refused however to order that they be set at liberty since their original arrest was valid and the Advocate-General on behalf of the Crown intimated that it was intended to prosecute them under the ordinary law. On 26-7-1946, the Governor of the Punjab promulgated the Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance, 1946 and the convicts who had been released on bail were rearrested and recommitting to prison. This led to a crop of petitions under ss. 491 and 561-A, Criminal P. C., in which it was alleged that the Ordinance of 1946 was *ultra vires* the Governor of the Punjab. In view of the importance of the question raised, several of these petitions were referred to this Bench for disposal. My learned brother and I have heard the arguments which have been addressed to us with conspicuous ability by Mr. Gopal Singh for the petitioner and the Advocate-General for the Crown. I am clearly of the opinion that it was within the competence of the Governor of the Punjab to promulgate this Ordinance, that the Ordinance is valid in the eye of law and that it has fulfilled the purpose which it was designed to achieve.

[2] The Punjab Frontier Crimes Regulation, 1887, which, as the name implies, was designed to provide a special Code for the administration of criminal justice in certain frontier areas of the Punjab, came into force on 10th March 1887 and extended to the districts of Peshawar, Kohat, Hazara, Bannu, Dera Ghazi Khan and Dera Ismail Khan. On 18th September 1901 it was

* See A. I. R. (35) 1948 Lah. 33 (F.B.).

repealed and replaced by the Frontier Crimes Regulation, 1901, which also applied to the six districts mentioned above. Towards the end of 1901 certain administrative changes of far reaching importance were made. On 25th October 1901, a new administrative area, known as the North-West Frontier Province, was carved out of the Punjab by the separation of the Frontier districts of Kohat, Hazara, Bannu and Dera Ismail Khan. On 1st November 1901, the Attock Tahsil of the Hazara District was transferred to the Rawalpindi District and on 9th November 1901 the Mianwali District was created by taking out the Mianwali and the Isa Khel Tahsils from the Bannu District and Bhakkar and Leiah Tahsils from the Dera Ismail Khan District. As the Regulation of 1901 applied originally to the Tahsils of Mianwali, Isa Khel, Bhakkar and Leiah, it continued to apply to these Tahsils when they came to form part of the geographical area known as the Mianwali District. From 1901 to 1944 the criminal administration of this area continued to be regulated by the provisions of this enactment without any serious objection having been raised before a Court of law or any serious protest having been received from any quarter.

[3] In the year 1944, a question arose whether certain provisions of the Regulation of 1901 applied to certain classes of persons. The Regulation of 1887 declared that certain sections of the Regulation were of general application while the others could be enforced only against Pathans and Biluchis and such other classes as were declared by a notification in the Official Gazette to be subject thereto. On 15th November 1887 the Provincial Government issued a notification in which it was declared that Pathans and Biluchis and non-European British subjects ordinarily resident in the Districts to which the Regulation applied, their dependents, servants and others, jointly concerned in the commission of offences were subject to the provisions of the Regulation. As a result of this notification the Regulation was enforced not only against the Pathans and Biluchis who were specifically mentioned in the statute but also against the other classes of persons mentioned in the notification. The Regulation of 1901, which repealed the Regulation of 1887 and which re-enacted a similar provision, also empowered the Provincial Government to extend by notification the provisions of the Regulation to persons other than Pathans and Biluchis. No fresh notification was issued, but in accordance with the practice which had been followed without a break since the year 1887, the entire Regulation continued to be enforced not only against Pathans and Biluchis but also against other classes of persons exactly as if the previous noti-

fication had continued in force or a new notification had been issued. It was not till the year 1944 that a Full Bench consisting of Beckett, Abdur Rahman and Marten Judges declared in A. I. R. (32) 1945 Lah. 65¹ that notwithstanding the provisions of S. 24, General Clauses Act, the notification issued under the Regulation of 1887 could not operate as a valid notification under the Regulation of 1901. The effect of this decision was to render illegal a large number of orders made, proceedings taken and acts done against persons other than Pathans and Biluchis. The Provincial Government hastened to deal with the situation. On 21st April 1944, the Governor of the Punjab issued a notification declaring that the Regulation of 1901 applied to all classes of persons to whom the earlier Regulation had applied. This was followed on 28th April 1944 by the Frontier Crimes (Validation of Acts, Orders and Proceedings) Ordinance, 1944 and on 23rd December 1944 by a Validating Act under a similar title. Section 2 of these enactments, which are in almost identical terms, runs as follows:

"2. All orders made, proceedings taken and acts done by the Provincial Government by any authority subordinate to the Provincial Government or by any person, which were made, taken or done, or which purported to be made, taken or done, in the exercise of powers derived from the provisions of the Frontier Crimes Regulation, 1901 (hereinafter referred to as the said Regulation), by virtue of Punjab Government notification No. 1156, dated 15th November 1887, or in execution of or in compliance with any orders made or sentences passed by the Provincial Government or by any authority subordinate to the Provincial Government in the exercise or purported exercise of powers as aforesaid, shall be deemed to be and always to have been, validly made, taken and done, and for the purposes of the said Regulation, and of any other law for the time being in force, all such orders, proceedings and acts shall be as good and valid, as if the said notification was issued under the provisions of S. 1 of the said Regulation."

The validity of these enactments was called into question without loss of time and a Division Bench of this Court referred two questions to a Full Bench of five Judges, namely:

(1) Whether Punjab Ordinance, I of 1944 and Punjab Act VII of 1944, are *ultra vires*, and

(2) If the answer is in the negative, whether the Ordinance and the Act validate the orders, proceedings and acts therein referred to?

[4] Delivering the judgment of the Full Bench Ram Lall J. observed as follows:

"The net result is that in my view the Regulation was not expressed to apply and so did not in fact apply to a tract of land covered by the six named districts and therefore, when for any reason whatever any portion went out of the jurisdiction of these six districts, the Regulation ceased to apply. Therefore, as from the date of the creation of the new District of Mianwali, the Regulation itself ceased to apply to it and any action taken under the Regulation was, therefore, void so far as that district was concerned.

I would hold therefore, that neither the Punjab Act VII of 1944 nor the Punjab Ordinance I of 1944 is

ultra vires the Punjab Legislature or the Governor of the Punjab in so far as the Federal Legislature has not exclusive jurisdiction to legislate. The cases out of which the present reference arises are within the competence of the Provincial Legislative Authority. But what the Legislature has done is to remedy the omission of a notification not to enact a law on the lines of the Regulation."

[5] The Full Bench accordingly returned the following answers to the questions propounded by the Division Bench, namely :

(1) That the Ordinance and the Act were not *ultra vires* the Provincial Legislative Authority.

(2) That the Ordinance and the Act do not validate the orders, proceeding and acts therein referred to.

[6] As stated above, the judgment of the Full Bench was delivered on 3rd April 1946. On 26th July 1946, the Governor of the Punjab promulgated the Frontier Crimes (Validation of Orders, Proceedings, Sentences and Acts) Ordinance, 1946. Section 2 of this Ordinance is in the following terms :

"(2) All orders made, proceedings taken, sentences passed and acts done in the district of Mianwali by the Provincial Government, or by any authority subordinate to the Provincial Government, or by any person, which were made, taken, passed or done or which purported to be made, taken, passed, or done in exercise of the powers derived or believed to be derived from the provisions of the Frontier Crimes Regulation 1901, either by virtue of Punjab Government notifications Nos, 1156, dated 15th Nov. 1887, and 1672-J-44 31395, dated 18th April 1944 or otherwise, or in execution of or in compliance with any orders made or sentences passed by the Provincial Government or by any authority subordinate to the Provincial Government in the exercise or purported exercise of powers as aforesaid are hereby confirmed and shall be deemed to be and always to have been validly made, taken, passed, or done and for the purposes of the said Regulation and of any other law for the time being in force all such orders, proceedings, sentences and acts shall be as good and valid as if the said Regulation was applicable to the said district of Mianwali and the said notification had issued under the provisions of s. 1 thereof."

[7] It is the validity of this Ordinance which has now been challenged before us. Before I proceed to deal with the questions which have arisen in this case, it would perhaps be desirable to say a few words in regard to the division of legislative powers between the Federal and the Provincial Legislatures. The Constitution Act has introduced a highly complex type of federation and, as is inevitable in federations of this kind, has provided three elaborate lists, known as the federal legislative list, the provincial legislative list and the concurrent legislative list. The first two lists are exclusively within the jurisdiction of the Federal and the Provincial Legislatures. The third list provides a field of legislation which is within the competence both of the Federal and of the Provincial Legislatures (s. 100.) If any provision of a provincial law is repugnant to any provision of a federal or an existing Indian Law in the concurrent sphere, then the federal law or the existing Indian Law

prevails and the provincial law is to the extent of the repugnancy void. If, however, the provincial law has been reserved for and has received the assent of the Governor-General, then it prevails in the province over the federal law or the existing Indian Law, as the case may be (s. 107).

[8] The expression "repugnant" has not been defined in the statute. But it has come up for consideration in a large number of cases in Canada and Australia. These cases were reviewed with care by Narsinga Rau J. in A. I. R. 1939 Cal. 628.² He came to the conclusion that it is too narrow a test to say that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says 'do' and the other 'don't'. There may well be cases of repugnancy where both laws say 'don't', but in different ways. The true test is that if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and, therefore, inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law.

[9] The principal grounds on which the validity of the Ordinance has been impugned are:— (a) that the Ordinance of 1946 is repugnant to the Indian Councils Act, 1870, to the Frontier Crimes Regulation, 1901, and to the Criminal Procedure Code, 1898; (b) that the Governor of the Punjab had no power to validate certain acts over which the Federal Legislature had exclusive legislative control; (c) that the Governor of the Punjab had no power to promulgate an Ordinance which could operate retrospectively, and (d) that in promulgating this Ordinance, the Governor of the Punjab has exercised the powers of a Court and not the powers of a Legislative authority.

[10] Although Mr. Gopal Singh has examined every possible aspect of the question, he has not, I fear, been able to add considerably to the argument addressed by him to the Full Bench or to bring new light to bear on the important issue that has been raised. Most of the arguments have already been examined, weighed and demolished.

[11] The first objection is that the impugned legislation is repugnant to the provisions of the Indian Councils Act, 1870, and must, therefore, be deemed to be absolutely void and inoperative. In the year 1870, the British Parliament enacted a measure to make better provision for making laws and regulations for the less advanced parts of India. A very simple machinery was devised. The Secretary of State for India in Council was to declare the provisions

of S. 1 of the Act of 1870 applicable to some particular part of a British Indian Province. Thereupon, the Local Government of that part of British India was at liberty at any time to propose to the Governor-General in Council drafts of regulations for the peace and good government of that part, and these drafts, when duly approved and assented to by the Governor-General and duly gazetted, had the same force of law as if they had been formally passed at sittings of the Legislative Council. A large number of regulations were promulgated under this Act, including, among others, the Punjab Frontier Crimes Regulation, 1887, and the Frontier Crimes Regulation, 1901. These Regulations extended to the districts of Peshawar, Kohat, Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan. Mr. Gopal Singh contends that as the Ordinance of 1946 has the effect of extending the Regulation of 1901 to the district of Mianwali when the Regulations of 1887 and 1901 promulgated under the Act of 1870 were to apply only to the six districts mentioned above, it must be deemed to be repugnant to Indian Councils Act, 1870. Again it is contended that as the Ordinance was promulgated by the Governor of the Punjab, while the Act of 1870 contemplated that Regulations should be promulgated only by the Governor-General, the Ordinance must be deemed to be repugnant to the Act of 1870. Both these contentions appear to me to be wholly devoid of force. In the first place there is no Act known as the Indian Councils Act, 1870. Secondly if there is one, it has been repealed and is no longer in force. It is true that an Act, cited as 33 Vict. Chapter 3, was placed on the statute book of the United Kingdom in the year 1870, but this Act like others passed before 1896, was not given any title. In the year 1896, the British Parliament enacted a measure, called the Short Titles Act, 1896, to facilitate the citation of Acts of Parliament. According to an entry in the Schedule to this Act, Act Nos. 33 and 34 Victoria, Chapter 3, entitled "an Act to make better provision for making laws and regulations for certain parts of India and for certain other purposes relating thereto" was named the Government of India Act, 1870. This Act was repealed by the Government of India Act, 1915 (*vide* S. 130 of the Act of 1915 read with the Fourth Schedule to the said Act.) If the Act of 1870 has been repealed and is no longer on the statute book of the United Kingdom, it is futile to argue that the Ordinance of 1946 is inconsistent with that Act. It is true that the Frontier Crimes Regulation of 1901 was enacted in exercise of the powers conferred by that Act, but that Act has now ceased to exist and the Regulation of 1901 is

continuing in force under S. 276, Government of India Act, 1935. The Constitution Act has conferred powers on the Central and the Provincial Legislatures to legislate in their respective spheres and these powers are as plenary and as ample within the limits prescribed in the statute as the Parliament itself possesses. I have no hesitation in holding, therefore, that there is no inconsistency between the Act of 1870 and the Ordinance of 1946.

[12] Again, it is contended that as the Ordinance of 1946 (a provincial law) is repugnant to the Frontier Crimes Regulation, 1901, and the Criminal Procedure Code, 1898 (existing Indian Laws) and as the assent of the Governor-General was not obtained to the promulgation of the Ordinance, the existing Indian Laws shall prevail and the Ordinance shall to the extent of the repugnancy be void. In view of the test of repugnancy, to which a reference has already been made, there is no doubt in my mind that there is no inconsistency between the Ordinance of 1946 and the Regulation of 1901. The Regulation of 1901 applies to the districts of Peshawar, Kohat, Hazara, Bannu, Dera Ghazi Khan and Dera Ismail Khan, while the Ordinance of 1946 applies this Regulation to the District of Mianwali. By making the provisions of the Regulation applicable to six districts only, the Legislature evinced its intention of occupying only a part of the field. It made no provision for the other districts. The Governor of the Punjab was thus justified in extending it to the Mianwali district. The Regulation of 1901, which applies to the six districts, and the Ordinance of 1946, which applies to the District of Mianwali alone, can, in my opinion, stand together. There can thus be no inconsistency or repugnancy between these two laws.

[13] Nor is there any repugnancy between the Ordinance of 1946 and the Code of Criminal Procedure, 1898. Both these enactments deal with Criminal Procedure (item 2 in list 3) and it may thus be assumed that there is a domain in which the Provincial law and the existing Indian law overlap. If the field is clear, neither legislation can be held to be *ultra vires*; if it is not, the existing Indian Law must prevail. There can be little doubt that the field is clear in this case. Sub-section (2) of S. 1, Criminal P. C., provides that the Code

"extends to the whole of British India; but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force..."

Section 5 runs as follows :

"(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise

dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

These two provisions make it quite clear that if a special form of procedure has been prescribed by any special or local law for the time being in force, it is that procedure which must be followed; if no such procedure has been prescribed, the trial must be regulated by the procedure set out in the Criminal Procedure Code. In other words, an alternative procedure has been expressly authorised by the Code itself. It follows as a corollary that the Code had left the field clear for the promulgation of the Ordinance of 1946. There is, in my opinion, no repugnancy between the Code and the Ordinance and both of them can continue to exist side by side.

[14] The objection that the Governor of the Punjab had no power to validate certain acts appears to me to be more substantial. The object of a validating Act is to enable parties to carry into effect that which they have designed and attempted but which has failed of its expected legal consequences only by reason of some statutory disability or irregularity in their action. By their very nature such Acts operate on conditions already existing. They can validate acts which the Legislature could have authorised—not those which it could not. The Ordinance of 1946 validates all orders which were made in exercise of powers derived or believed to be derived from the provisions of the Frontier Crimes Regulation, 1901. The question at once arises whether it was within the competence of the Governor to validate orders passed under S. 21 or S. 29 of the Regulation of 1901. Section 21, for example, empowers the Deputy Commissioner to debar all or any member of a frontier tribe from access to British India and to prohibit all or any person within the limits of British India from all intercourse or communication with such tribe. Admission into and emigration and expulsion from India fall under item 17 of the Federal Legislative List and the Central Legislature alone can make laws in regard to these matters. Again, S. 29 renders the carrying of arms in certain circumstances punishable with rigorous imprisonment for a period of five years. Arms, fire-arms, ammunition and explosives fall under items 29 and 30 of the Federal Legislative List. The Governor of the Punjab had no power to promulgate an Ordinance in regard to these matters. It seems to me, therefore, that this Ordinance in so far as it deals with matters in respect of which the Federal Legislature alone

could make laws must be deemed to be repugnant to the provisions of the Constitution Act.

[15] But I can see no legal objection to the Ordinance being allowed to operate retrospectively. The general rule that no statute should be construed so as to have a retrospective operation unless its language is such as to require such a construction has no application to Validating Acts which by their very nature are intended to act upon past transactions and are, therefore, necessarily retrospective. It is argued that even if it is within the competence of a Provincial Legislature to enact a retrospective measure, it was not within the competence of the Governor to promulgate a retrospective Ordinance. This contention is based on certain observations of Zafrulla Khan J. in A. I. R. 1943 F. C. 75.³ The learned Judge expressed the view that as the powers of an ordinance making authority are limited as to the circumstances in which they can be exercised and as to the time during which any measure so enacted can remain in operation, it is not quite certain whether any such authority has power to make a retroactive law. These observations are, in my opinion, in the nature of obiter. *Prima facie*, the powers of a Governor to make Ordinances are as wide as the powers of a Provincial Legislature to make laws, and with all respect to the learned Judge of the Federal Court, I can see no reason why he should not be at liberty to promulgate retroactive Ordinances. A number of instances can be cited in which Ordinances of this kind have been promulgated by the Governor-General of India and Governors of Provinces.

[16] The last objection was that it was not within the competence of the Governor of the Punjab to promulgate an Ordinance which had the effect of reopening transactions which had been adjudicated upon by Courts of law and were past and closed. This objection is based on a certain passage appearing in Cooley's admirable work on Constitutional Limitations in which the learned author observes as follows:

"Legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made, for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form since the Legislature would in effect sit as a Court of review to which parties might appeal when dissatisfied with the rulings of the Courts."

[17] These observations are based really on the peculiarities of the American Constitution, which creates three departments of Government vesting the legislative power in one, the executive power in another and the judicial power in a third. The fifth and the fourteenth amendments provide that no person shall be "deprived

of life, liberty or prospect without due process of law". The expression "due process of law" has been interpreted as referring only to "judicial process" and as not including legislation, and "judicial process" was held to imply competence or jurisdiction in the Court and opportunity for a hearing. A measure enacted by a Legislature in the United States of America in violation of this express provision of the Constitution would obviously be null and void. But no such limitations have been imposed on the powers of the Legislatures of this country. Section 100 of the Constitution Act empowers the Provincial Legislature to make laws in respect of any of the matters enumerated in the Provincial and the Concurrent Legislative Lists, and when a Provincial Legislature proceeds to enact a measure upon any subject which is within its jurisdiction to legislate upon, its jurisdiction as to the terms of such legislation is as large as that of the Imperial Parliament in the United Kingdom over a like subject. The powers of a Governor to promulgate Ordinances are co-extensive with the powers of the Provincial Legislature to make laws. The quotation from Cooley's Constitutional Limitations cited above came up for consideration by the Federal Court in A. I. R. (31) 1944 F. C. 1.⁴ Spens C. J. who delivered the judgment of the Court gave excellent reasons for holding that this principle of the American Constitution is not applicable to this country. Indeed the precedents show that the Legislature in India have on various occasions enacted laws providing that suits which had been dismissed on a particular view of the law should be restored and retried. The Decrees and Orders Validating Act, 1936, may be cited as an instance.

[18] Most of the objections which have been dealt with in the preceding paragraphs were raised before and considered by the Full Bench to which a reference has already been made. The learned Judges held that the objections were of no substance and that the validating Act of 1944 was not *ultra vires* the Provincial Legislature. The Ordinance of 1946 reproduces the Validating Act of 1944 with certain additions which have been rendered necessary by the observation of the Full Bench. Except in so far as this Ordinance endeavours to validate acts which could be validated only by the Federal Legislature, the Ordinance is, in my opinion, *intra vires* the Governor of the Punjab and could be promulgated by him.

[19] There can be little doubt that the Ordinance of 1946 has achieved the object which the Governor of the Punjab had in view. Not only does it validate all orders made, proceedings taken, sentences passed and acts done in the District of Mianwali, which were made, taken,

passed or done or which purported to be made, taken passed or done in the exercise of the powers derived or believed to be derived from the provisions of the Regulation of 1901 or the Notifications of 1887 and 1944, but it provides also that all such orders, proceedings, sentences and acts shall be as good and valid as if the said Regulation was applicable to the District of Mianwali and the said Notifications had issued under the provisions thereof. The language which has been used could not have been clearer or more comprehensive. If the object of a validating enactment is to cure defects and if the intention of the Legislature embodied in an enactment is the law, there can be little doubt that the defects, to which attention was drawn by the Full Bench of this Court, have been fully cured. The sweeping general words used in the Ordinance make it quite clear that the intention is to apply the Regulation of 1901 retrospectively to the District of Mianwali. Except to the limited extent indicated above, the Ordinance is *intra vires* and must be held to be valid in the eye of law. I would hold accordingly, and dismiss the petitions under Ss. 491 and 561A, Criminal P. C.

[20] Mohd. Sharif J. — I agree.

[21] By the Court. — Permission to file an appeal to the Federal Court cannot be allowed.

G.N.

Petitions dismissed.

A. I. R. (35) 1948 Lahore 126 [C. N. 43.] SPECIAL BENCH

SALE, MARTEN AND BHANDARI JJ.

Amar Nath (A. N. John) — Petitioner v. Mrs. Amar Nath (Mrs. Paggy John) — Respondent.

Matrimonial Ref. No. 6 of 1945, Decided on 9-11-1945, from order of Dist. Judge, Lahore, D/- 22-2-1945.

(a) Divorce Act (1869), Ss. 2 and 7—Parties married as Hindus according to "Arya" rites—Petition by husband for dissolution of marriage on ground of wife's adultery—Wife professing Christianity at time of petition—Court can entertain petition under S. 2—But relief can be granted only if marriage is monogamous.

The husband was a Hindu of the Arya Samaj sect. His wife was originally a Christian but was converted to Hinduism just before marriage. The parties were married as Hindus according to "Arya" rites in 1941. In 1942 the wife was reconverted to Christianity but continued to live up to autumn of 1944 with her husband who was still an Arya Samajist. The husband filed a petition for dissolution of his marriage on ground of his wife's adultery in December 1944 with an unknown person. The adultery was proved:

Held that (1) the fact that one of the parties, viz., the wife, professed Christianity at the time of presentation of the petition gave the Court jurisdiction to entertain the petition under S. 2. But it could not follow that the Court could necessarily grant the relief prayed even though adultery had been proved; [Para 5]

(2) the proviso to S. 7 could not apply as at the time of the commission of the matrimonial offence only one party (wife) professed the Christian religion, the husband still being a Hindu; [Para 7]

(3) under S. 7 the Court could not grant relief if the marriage was non-monogamous: 17 Mad. 235 (F. B.) and Matrimonial Reference No. 6 of 1944, *approved*; 30 A.I.R. 1943 Cal. 146, *Expl.*; 18 Cal. 252, *Dissent*. [Para 7]

(b) Evidence Act (1872), S. 45 — Principles of Hindu law of marriage—Ex parte evidence not admissible.

Custom in variance of the general law is matter of evidence but not the law itself. Evidence of experts is not admissible for the purpose of ascertaining the principles of the ordinary Hindu law of marriage. That is purely a point of law which it is for the Court to decide. The Hindu law on marriage is the law of the land and is in force in British India. It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be: 27 A. I. R. 1940 P. C. 116 and 12 A.I.R. 1925 All. 720, *Rel. on*. [Para 9]

Cases referred :—

1. ('43) 30 A. I. R. 1943 Cal. 146 : I.L.R. (1943) 1 Cal. 340 : 205 I. C. 597, Dr. Niranjana Das Mohan v. Mrs. Ena Mohan.
2. ('94) 17 Mad. 235 (F.B.), Thapita Peter v. Thapita Lakshmi.
3. ('91) 18 Cal. 252, Gobardhan Das v. Jasa Damoni Dassi.
4. ('40) I. L. R. (1940) 21 Lah. 493 : 27 A. I. R. 1940 P. C. 116 : I.L.R. (1940) Kar. P. C. 251 : 67 I.A. 251 : 189 I. C. 1 (P. C.), Masjid Sahid Ganj v. Shiromani Gurdwara Parbandhak Committee Amritsar.
5. ('25) 47 All. 823 : 12 A.I.R. 1925 All. 720 : 89 I. C. 690, Aziz Bano v. Mahomed Ibrahim Hussain.

M. L. Sethi and Kishore Chand—for Petitioner.

S. C. Manchanda—for Respondent.

Sale J.—On the petition of Mr. Amar Nath, known professionally as Mr. A. N. John, for the dissolution of his marriage with his wife Mrs. Paggy John (nee Miss Paggy Bean), the learned District Judge of Lahore has granted the petitioner under the Indian Divorce Act a decree nisi for the dissolution of the marriage on the ground of the wife's adultery with a man unknown. This decree nisi is now before us for confirmation under S. 17 of the Act.

[2] The petitioner is a Hindu of the Arya Samaj sect. The respondent was originally a Christian but just before the marriage was converted to Hinduism. The parties were married as Hindus on 22-2-1941. The marriage certificate a copy of which has been produced as Ex. P. W. 3/3, recites that it was issued by the Arya Samaj Anarkali, Lahore, and certifies that the marriage had been performed according to 'Arya' rites. For this purpose, the bride previously known as Paggy Bean, assumed the name of Parbati Devi. Thereafter the parties lived together at various places, the last place of cohabitation being at Lahore during October and November 1944. In the autumn of 1942, the wife was reconverted to Christianity but continued up to the

autumn of 1944 to live with her husband, who was and still is an Arya Samajist.

[3] The marital offence pleaded is that the respondent committed adultery at Lahore with a European military officer, whose identity is unknown, in the temporary absence of the petitioner at Rawalpindi at the beginning of December 1944. The respondent was duly served in the lower Court but did not contest the petition. Indeed there is a letter from her on the record which impliedly admits adultery. The learned District Judge has accepted the evidence of the petitioner led in proof of his wife's adultery, and we have no reason to doubt that adultery has been committed by the respondent as alleged.

[4] The substantial question, however, for determination in this case is whether the Indian Divorce Act can be invoked to dissolve a marriage performed in the circumstances of this case. The learned District Judge has held that although the marriage was performed between Hindus according to Hindu law, the Court has, on proof of adultery, jurisdiction to dissolve the marriage merely because at the time of the presentation of the petition the respondent professed the Christian religion, having been previously reconverted to Christianity. For this proposition the learned District Judge has relied on the authority of a Division Bench of the Calcutta High Court cited in A.I.R. 1943 Cal. 146.¹

[5] Now, there can be no doubt that the fact that one of the parties, i. e., the respondent, professed Christianity at the time of presentation of the petition gives the Court jurisdiction to entertain the petition under S. 2, Divorce Act. But it does not follow that the Court can necessarily grant the relief prayed even though adultery has been proved. A marriage performed according to Hindu law is usually recognized to be non-monogamous; and since under S. 7, Divorce Act, the Court is limited to granting relief on principles and rules conformable to those prevailing in the Divorce Court in England, the question arises whether this Court can dissolve under this Act a marriage which being usually regarded as non-monogamous would not be recognised by the Courts in England.

[6] This point was considered by a Full Bench of the Madras High Court, 17 Mad. 235,² when the learned Judge held that having regard to S. 7, Indian Divorce Act, the marriages contemplated by the Act are those founded on the principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, such a marriage being non-monogamous. This decision was given in 1893; and in

1912 a proviso was added by an amending Act to S. 7, Indian Divorce Act to the effect that

"Nothing in this section shall deprive the Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded."

[7] The statement of objects and reasons of this amending Act recite that this proviso was added specifically to override the decision of the Madras Full Bench just cited and to extend the jurisdiction of the Court to give relief in the limited circumstances provided. Now, this proviso admittedly does not apply to the facts of the present case, for at the time of the commission of the matrimonial offence only one party (the respondent) professed the Christian religion; the husband has always been and still is a Hindu. It cannot therefore, be said that the Madras Ruling is obsolete, or inapplicable to this case. It would seem to follow, therefore, that we are precluded from granting relief in this case, if the marriage is to be regarded, according to the accepted view of the Hindu Law of Marriage, as non-monogamous. With the exception of one Calcutta authority, 18 Cal. 252,³ which did not discuss the interpretation of S. 7 no single judicial instance of relief under the Indian Divorce Act in the case of a non-monogamous marriage has been brought to our notice. Indeed, the weight of authority which, besides the Madras case includes rulings of the Bombay, Rangoon as well as of our own Court (see Matrimonial Reference No. 6 of 1944) appears to favour the view that relief cannot be granted under the Indian Divorce Act in the case of a non-monogamous marriage. The authority on which the learned District Judge has relied (A.I.R. 1943 Cal. 146¹) is not an instance of relief in the case of a non-monogamous marriage because the marriage found valid in that case was one performed under the Special Marriage Act, which can undoubtedly be dissolved under the Indian Divorce Act. But Mr. Sethi has drawn attention to the fact that in the Calcutta case there was a second marriage performed according to Hindu Arya Samaj rites; and the learned Judge, Mr. Justice Rau, who wrote the judgment in A. I. R. 1943 Cal. 146,¹ made certain observations on page 149 about the status of such a marriage which Mr. Sethi urges have a direct bearing on the present case. The learned Judge said:

"Had the marriage in the present case been polygamous, it might conceivably have been argued that the Indian Courts would have had no jurisdiction to dissolve it, since the English Divorce Court does not recognise such a marriage. There is, however, satisfactory evidence, as found by the District Judge that an Arya Samaj marriage is monogamous; therefore there is nothing even in section 7 to bar relief."

[8] These observations were really obiter to

that case but Mr. Sethi argues that since a distinguished Hindu Judge of the Calcutta High Court has recognized an Arya Samaj marriage to be monogamous we should hold that the marriage in the present case, having been performed according to Arya rites, is also monogamous. It seems clear, however, that in the Calcutta case the question whether the Arya Samaj marriage in question was monogamous was put in issue; evidence was led, and there was a finding, which the learned Judge considered satisfactory, that the marriage was in fact monogamous. In the present case the attention of the Court has not been directed to this point and no evidence has been led to show whether the marriage now in question is or is not monogamous.

[9] We allowed Mr. Sethi an adjournment to enable him to ascertain whether he was in a position to cite evidence on the point whether the present marriage was monogamous and he has now informed us that he wishes to produce evidence to this effect. We have, therefore, decided to remand the case to the learned District Judge for further evidence. For this purpose we frame the following additional issues:— (1) By what rites was the marriage in question performed, and do such rites, by custom or otherwise, contemplate monogamous marriage? (2) Did the parties to the marriage intend this marriage to be monogamous and was the ceremony performed on this understanding? (3) If so, can such a marriage be legally recognised as monogamous? (4) Can this marriage be dissolved under the Indian Divorce Act?

[10] We remand this case to the learned District Judge to take such evidence as the petitioner may produce and to report to us. But on the question of the reception of evidence, we think it proper to make some observations as to the limits within which evidence would be admissible. What is admissible is evidence on the nature of this marriage ceremony, on the intention of the parties in going through the ceremony, and on the question of custom in variance of the general law, if such a custom is alleged. Evidence is not admissible for the purpose of ascertaining the principles of the ordinary Hindu Law of marriage; that is purely a point of law which it is for the Court to decide. In 21 Lah. 493⁴ their Lordships of the Privy Council deprecated the practice of obtaining the opinion of experts for ascertaining the principles of Hindu or Muslim law. Their Lordships observed on page 503:

"It would not be tolerable that a Hindu or Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon

Hindu or Muslim law were to depend on the evidence given in a particular case. The system of 'expert advisers' (muftis, and maulvis or in the case of Hindu law pandits) had its day but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself." In this judgment their Lordships expressly approved the observations of Sulaiman J. in 47 ALL. 823⁵ on page 835. In holding that the so-called expert evidence of a witness in regard to the Shia law on marriage was not admissible under the Indian Evidence Act, the learned Judge observed :

"The Shia law on marriage is the law of the land and is in force in British India. ... It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses however learned they may be."

These observations would apply equally to the interpretation of the Hindu Law of Marriage. With these observations we remand the case to the learned District Judge for evidence on the issues framed by us with directions to report as soon as possible. The petitioner has been directed to appear before the learned District Judge for orders on the 26th November. In view of the importance of the point of law involved, we order that notice should issue both to the King's Proctor and to the Advocate-General; and we place on record our opinion that the Advocate-General should instruct counsel to assist the Court, after remand in deciding the question of the applicability to this case of the Indian Divorce Act.*

*[For judgment delivered by the Full Bench on receipt of findings of the District Judge on the issues remitted to him by the Full Bench. See, A. I. R. (35) 1948 Lah. 129 (F.B.).]

G.N.

Order accordingly.

A. I. R. (35) 1948 Lahore 129 [C. N. 44.]
FULL BENCH

MARTEN, BHANDARI AND CORNELIUS JJ.

Mr. Amar Nath (A. N. John)—Petitioner.
v. Mrs. Amar Nath (Mrs. Paggy John)—Respondent.

Matrimonial Reference No. 6 of 1945, Decided on 18-11-1946, from order of Dist. Judge, Lahore, D/-22-2-1945.

(a) Divorce Act (1869), S. 17—Decree of dissolution—No legal marriage—Decree cannot be confirmed.

The High Court cannot confirm a decree of dissolution of marriage which was passed on the erroneous conception that there was ever a legal marriage to dissolve. [Para 4]

(b) Divorce Act (1869), S. 17—Decree for dissolution on assumption that marriage was monogamous—Confirmation proceedings—Admission that marriage was not monogamous—Marriage cannot be dissolved.

Where a decree for dissolution was passed on the assumption that the plaintiff as an Arya Samajist could only enter into a monogamous marriage, but upon a reference to the High Court for confirmation of the decree, he admitted having another wife at the time of the marriage sought to be dissolved :

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Held, that the plaintiff could not, in the confirmation proceedings, argue that the second marriage was, in fact, valid as a polygamous marriage and that it could be dissolved under the provisions of the Act. [Para 5]

(c) Divorce Act (1869), Ss. 2 and 7, proviso—Effect of proviso—Act does not apply to polygamous marriages if both parties do not profess Christian religion at the time of matrimonial offence.

The proviso to S. 7 only extends the jurisdiction of the Courts to give relief in the limited circumstances provided therein. Therefore, if the Act otherwise is not applicable to polygamous marriages, the proviso will only make it so in limited cases where both parties to such a marriage had since been converted to Christianity and professed the Christian religion at the time that the cause of action for dissolution arose. Nothing in S. 2, in any way enlarges the effect of this provision. There is, therefore, nothing in the Act which operates to give relief in cases of polygamous marriages not covered by the Proviso: 17 A. I. R. 1930 Bom. 385; 18 Cal. 252; 30 A. I. R. 1943 Cal. 146; (1946) 174 L. T. 63 and (1909) 25 T. L. R. 146, *Disting.* [Para 5]

(d) Divorce Act (1869), Ss. 2 and 7 proviso—Parties to marriage becoming Christians subsequent to marriage—Marriage can be dissolved under Act—One party ceasing to be Christian since commission of matrimonial offence—Still relief can be granted.

Per *Cornelius J.*:—The proviso to S. 7 implies that whatever the religion which the parties were professing at that time of their marriage, and whatever be the incidents of that marriage, if they subsequently became Christians, their union must be assumed to have taken on the character of a Christian marriage, i. e., a voluntary union for life of one man with one woman to the exclusion of all others, so that if during the period that they remained Christians, either of them were guilty of a matrimonial offence the other would be entitled to seek relief under the Act. By virtue of S. 2, this relief would be granted notwithstanding that since the commission of the matrimonial offence one of the parties, but not both, had ceased to be a Christian. [Para 9]

(e) Punjab Laws Act (4 [IV] of 1872), S. 5—Arya Samajists—Questions of marriage or divorce—Applicability of Hindu law—One party becoming Christian—Marriage bond retains all characteristics of Hindu marriage.

Per *Cornelius J.*—Arya Samajists are Hindus, and therefore, if no custom be pleaded, the rule of decision in relation to a marriage or divorce where both parties are Arya Samajists must be the Hindu law. If one of such parties is converted to Christianity, the marriage bond between the parties will not in any way be affected and will retain all the characteristics of a Hindu marriage, unless there shall follow upon the conversion of one party repudiation or desertion by the other, and unless consequential legal proceedings are taken and a decree is made as provided by the Native Converts Marriage Dissolution Act, 1866. [Para 10]

(f) Hindu law — Marriage — Marriage becomes complete after saptapadi.

Per *Cornelius J.*:—A Hindu marriage in the vedic form which includes certain ceremonies such as performance of the *Homam*, the *panigrahana* or taking hold of the bride's hand and going round the fire with the vedic mantras, and the seven steps or *saptapadi*, is completed upon the taking of the seventh step, and under the Hindu law, the marriage tie thus created is indissoluble. [Para 10]

(g) Punjab Laws Act (4 [IV] of 1872), S. 5—Marriage performed according to Arya Samajic rites—Decree for nullity cannot be granted by High Court—Decree can be granted by court administering Hindu law.

Per *Cornelius J.*—In the case of a Hindu marriage in the Vedic form performed according to the Arya Samajic rites, the provisions of S. 5, Punjab Laws Act, prevail as against the Divorce Act and a decree for nullity in respect of the marriage cannot be granted by the High Court under the provisions of the Divorce Act, but can only be granted by the Courts administering the Hindu law i. e. the ordinary Civil Courts, while a decree for dissolution may be granted either by these Courts or by a Court acting under the Native Converts Marriage Dissolution Act, 1866. [Para 14]

Cases referred:—

1. ('30) 54 Bom. 877: 17 A. I. R. 1930 Bom. 385: 123 I. C. 37 (F. B.), *Nina Dalal v. Merwanji Pherozsah Dalal*.
2. ('91) 18 Cal. 252, *Gobardhan Das v. Jasadamoni Dassi*.
3. ('43) 30 A.I.R. 1943 Cal. 146: I. L. R. (1943) 1 Cal. 340: 205 I. C. 597, *Niranjan Das Mohan v. Mrs. Ena Mohan*.
4. (1946) 174 L.T. 63, *Mehta (otherwise Kohn) v. Mehta*.
5. (1909) 25 T. L. R. 146: (1909) P. 67: 78 L. J. P. 23: 99 L. T. 885, *Venugopal Chetti v. Venugopal Chetti*.
6. (1879) 5 P. D. 94: 40 L. J. P. 1: 41 L. T. 281: 27 W. R. 917, *Sottomayor v. De Barrows*.
7. (1874) 31 L. T. 638: 23 W. R. 226, *In re Alison*.
8. (1917) 1 K. B. 634: 86 L. J. K. B. 210: 115 L. T. 882, *Ex parte Mir Anwaruddin*.
9. (1868) 3 H. L. 55: 37 L. J. Ch. 433: 18 L. T. 833, *Shaw v. Gould*.

Madan Lal Sethi—for Petitioner.

Kali Sharan and Basant Krishan Khanna, Advocate-General—for Respondent.

Marten J.—This judgment should be read in continuation of the Full Bench judgment dated 9-11-1945* in which all the facts of this case are set out in full, besides a comprehensive discussion of the law points involved. As will be seen from that judgment, the main points which were referred for evidence and which have now come for consideration were:

"(1) Whether or not a marriage performed in accordance with the Arya Samaj rites, is legally recognised as a monogamous marriage. (2) Whether the parties in this case intended that the marriage should be monogamous and, if so, whether it can be dissolved in accordance with the provisions of the Indian Divorce Act under which the present petition was lodged."

[2] The learned District Judge has duly taken the evidence and the case has again come before the Full Bench to determine these points in accordance with law and on the evidence taken.

[3] However, at the instance of the learned Advocate-General who was called upon to assist us in deciding the points involved, the petitioner has made a written statement which in my view, completely alters the case and considerably shortens our task. He has said "I had a wife at the time I married Mrs. Peggy John. She is alive and residing with me as my wife. I have not divorced her." From this statement it becomes immediately apparent that the petitioner at the time of his second marriage, himself had no intention of entering into a monogamous marriage, though he may have deceived the un-

fortunate respondent into thinking that this was so. Further, if it be true that the law does recognise a marriage by the Arya Samajist rites as a monogamous marriage, then the petitioner could never in reality have been married by those rites and the marriage ceremony performed at the time was a mere farce. He has, in fact, committed bigamy.

[4] What is before us at this stage is only the question whether or not we should confirm a decree under the Act, dissolving a marriage on grounds of adultery. Such a decree could only have been passed on the assumption that the marriage was legal and therefore, dissoluble. It follows that this Court cannot confirm a decree of dissolution which was passed on the erroneous conception that there was ever a legal marriage to dissolve. In the circumstances, therefore, we can only refuse to confirm it.

[5] This is the short answer to the case. But, Mr. Sethi who appears for the petitioner wishes now to argue that we should hold that the second marriage is, in fact, valid as a polygamous marriage and that in these circumstances, it can be dissolved under the provisions of the Divorce Act. To entertain such an argument at this stage, would involve permitting the petitioner to reverse the whole of his case which hitherto, has been based on the assumption that he as an Arya Samajist, could only enter into a monogamous marriage. In my view, this cannot be allowed. But, even if for argument's sake, such a plea could now be entertained, learned counsel is still faced with the legal difficulty adequately discussed in the previous Full Bench judgment, that the marriage being polygamous, is not the sort of marriage which the Divorce Act was meant to cover; therefore, no relief can be given under this Act. Mr. Sethi wishes to utilize the proviso to S. 7 of the Act in support of this contention and he argues that in spite of the fact that this proviso *prima facie*, is self-restricted to cases where the parties to a marriage both profess the Christian religion at the time the cause of action arises, S. 2 as subsequently amended, extends its operation to cases in which only one such party was professing the Christian religion at the time of the cause of action, by virtue of the provision added to para. 1 of S. 2 to the effect that nothing thereafter contained shall authorise any Court to grant any relief under this Act except where the petitioner or the respondent professes the Christian religion. This argument has already been considered and adequately answered in the previous judgment of the Full Bench delivered by my learned brother Sale J. who has pointed out that the proviso added to S. 7 was declared in the statement of objects and reasons for the amending Act by which it was ad-

*See ('48) 35 A. I. R. 1948 Lah. 126 (S.B.).

ded, only to extend the jurisdiction of the Courts to give relief in the limited circumstances provided therein. It follows, therefore, that if the Act otherwise is not applicable to polygamous marriages, the proviso to S. 7 will only make it so in limited cases where both parties to such a marriage had since been converted to Christianity and professed the Christian religion at the time that the cause of action for dissolution arose. Nothing in S. 2 of the Act, in any way enlarges the effect of this provision.

[6] Nor am I convinced that any of the authorities now quoted by Mr. Sethi, establish that the Divorce Act operates to give relief in cases of polygamous marriages. 54 Bom. 877¹ was a case where the parties, one a Christian and the other a Parsi, had been married in France according to French law which of course, only recognised monogamous marriage. It was further stated in that judgment that monogamy had been established by the Legislature as regards Parsis. Therefore, in that respect the Parsi law was the same as that prevailing in England. Clearly, therefore, no question of the effect of polygamy was in issue. 18 Cal. 252² was a case where both parties had become Christians at the time of the cause of action. This clearly is specifically covered by the Act by virtue of the proviso to S. 7 which does not apply in the present case. A. I. R. (30) 1943 Cal. 146³ is a case which proceeded on the assumption that an Arya Samaj marriage is legally monogamous. In the present case, if that is so, as already pointed out, no such valid marriage had, in fact, taken place. (1946) 174 L. T. 63⁴ was another case in which it was presumed that the marriage was monogamous in its inception. In the present case, we cannot presume that now. Lastly, (1909) 25 T. L. R. 146⁵ is an authority dealing only with non-Christian foreigners who, however, elect to marry before an English Registrar according to the English law which, of course, does not recognise polygamy. In my view, therefore, there is no relief which this Court can give in the present instance. It cannot confirm the dissolution on the assumption that the marriage to be dissolved was a legally monogamous marriage. Neither can it dissolve a marriage entered into under the ordinary Hindu custom which admits polygamy. I would, therefore, set aside the decree of dissolution passed by the learned District Judge and dismiss this petition.

[7] **Bhandari J.** — I concur in the order proposed.

[8] **Cornelius J.** — This is a reference under S. 17, Divorce Act, 1889, for confirmation of a decree for dissolution of marriage granted by the District Judge of Lahore to Amar Nath alias A. N. John by reason of the adultery of his wife,

nee. Peggy Bean, with a person unknown, on or about 2-12-1944. The suit was undefended, and the learned District Judge relied on the evidence of the petitioner and his business partner a Mr. Sham Kapai, for holding that the petitioner returning unexpectedly to Lahore, where he lives, from a visit to Rawalpindi, and going to his flat, saw a man escaping by the back door. The witnesses say they followed the man for a short distance, but then returned, and it seems regrettable that they did not carry their pursuit further, for the petitioner had to confess that he had been unable to ascertain any particulars of this man. It was also said that the man left a garment behind namely a pyjama, as well as handkerchief, but these articles were not produced in evidence. Earlier matrimonial offences were mentioned which had been condoned, but there has clearly been no condonation of the last offence. A letter from the respondent has been placed on the record which is dated the 4th December 1944 and reads as follows:

"After this last incident it is quite obvious that we cannot live together again. I have left and do not ever intend to return to you, and so it is futile of you living in hopes. In any case my marriage to you as a Hindu has never meant a thing to me. I was and am a Christian and our so-called Hindu marriage has to me been a complete farce. It is not even recognised by my church. I of course take the full blame, for the "man" and for myself."

The reference to the "man" in this letter is perhaps sufficient to overcome any hesitation which may be felt in accepting the ocular evidence as to the incident of the morning of the 3rd December 1944, and accordingly, adultery may be held to have been established. The case must however fail upon another ground, which is that the marriage which it is sought to dissolve by means of these proceedings is not amenable to the provisions of the Divorce Act.

[9] It is stated in the petition and there is evidence to prove that the respondent who was a Christian was converted to Hinduism on the 22nd February 1941 by a priest of the Arya Samaj sect, and on the same date, a ceremony of marriage was performed between her and the petitioner "in Vedic form according to Arya Samajic rites." The petitioner was then, and appears always to have been a member of the Arya Samaj. The respondent is proved to have reverted to Christianity since she left the petitioner, and before the petition was filed. The petition therefore satisfies the condition laid down in S. 2, Divorce Act, that either the petitioner or the respondent should profess the Christian religion. Now, by S. 7 of the same Act, this Court is required in such cases to act and give relief on principles and rules which shall conform as nearly as may be to those on which the Divorce Court

in England for the time being acts and gives relief. A single exception to that rule is specified in the proviso, which lays down that relief may be granted in respect of a matrimonial offence occurring at a time when both parties to the marriage professed the Christian religion, and the implication obviously is that whatever the religion which the parties were professing at the time of their marriage, and whatever be the incidents of that marriage, if they subsequently become Christians, their union must be assumed to have taken on the character of a Christian marriage i. e., a voluntary union for life of one man with one woman to the exclusion of all others, so that if during the period that they remained Christians, either of them were guilty of a matrimonial offence the other would be entitled to seek relief under the Act. By virtue of s. 2 of the Act, this relief would be granted notwithstanding that since the commission of the matrimonial offence, one of the parties, but not both, had ceased to be a Christian.

[10] The question at once arises whether it is permissible to extend the provisions of the Act to a marriage such as that which is proved to have been performed between the parties to this petition. It may, I think, be safely said that this is the first case in this province in which an attempt has been made to secure dissolution of Hindu marriage performed in Vedic form according to the rites of the Arya Samaj under the Indian Divorce Act. The significance of this fact cannot be exaggerated for the Arya Samaj sect has been in existence in a flourishing condition for a great many years, and the Act has been in force for nearly eighty years now. Two reasons may perhaps be suggested for this circumstance. Firstly, the Divorce Court in London will not grant relief in relation to any marriage which is not, in essence, "a voluntary union for life of one man with one woman to the exclusion of all others", and a Hindu marriage is ordinarily polygamous. Secondly, under s. 5, Punjab Laws Act, 1872, in questions of marriage and divorce, the rule of decision is any valid custom applicable to the parties, and in the absence of custom, when the parties are Hindus the Hindu law, except in so far as it has been modified or repealed by statute, or varied by custom. To the first objection, the petitioner replies by referring to two recent decisions published in A. I. R. 1948 Cal. 146³ and (1946) 174 L. T. 63,⁴ to the effect that an Arya Samaj marriage is monogamous. I shall examine these authorities in detail later. At this point, I propose to state the legal position in relation to the second objection. There can be no doubt that Arya Samajists are Hindus, and therefore, if no custom be pleaded, the rule of decision in relation to a marriage or divorce

where both parties are Arya Samajists must be the Hindu law. How does the case alter if one of such parties to a marriage is converted to Christianity? It is clear that this will not operate to dissolve the marriage, *per se*, but if the parties are Indians, that one of them who has embraced Christianity may sue for "conjugal society" under the Native Converts' Marriage Dissolution Act, 1866, if there be desertion or repudiation by the other party, and upon the taking of certain proceedings, if the desertion or repudiation be contrived for a specified period, a decree of dissolution may be awarded. There is, so far as I can see, no ground for thinking that the nature and incidents of the marriage bond between the parties is in any way affected by the conversion to Christianity of one of them, and the bond will retain all the characteristics of a Hindu marriage, notwithstanding such conversion, unless there shall follow upon the conversion of one party, repudiation or desertion by the other, and unless consequential legal proceedings are taken and a decree is made as provided by the Act of 1866. Now, a Hindu marriage in the Vedic form which includes certain ceremonies such as performance of the *homan*, the *panigrahana* or taking hold of the bride's hand and going round the fire with Vedic *mantras*, and the seven steps or *saptapadi*, is completed upon the taking of the seventh step, and under the Hindu law, the marriage tie thus created is indissoluble. It is stated by Mulla in his Principles of Hindu Law, para 411 that

"divorce is not known to the general Hindu law. The reason is that a marriage from the Hindu point of view creates an indissoluble tie between the husband and the wife. Neither party, therefore, to a marriage, can divorce the other unless divorce is allowed by custom."

A custom of divorce is not pleaded by the petitioner, and it is evident that it could not be pleaded in a proceeding under the Indian Divorce Act. The contention appears to be that notwithstanding the provisions of the Hindu law and the Punjab Laws Act, the mere fact of one of the parties (in this case the respondent) being a Christian at the time of presentation of the petition gives this Court jurisdiction under the Act to dissolve the marriage.

[11] It will be convenient to state here the evidence on the record relating to the nature and quality of the marriage of which dissolution is here sought. The petition itself states that the marriage was "a legal Hindu marriage in Vedic form according to Arya Samajic rites." The officiating priest, Pandit Jagat Ram Sharma (P. W. 5) said the marriage was performed (and he certified to that effect) in accordance with the rites given in an Arya Samaj book of ritual "Sanskar Vidhi" and added "this is also called

a Vedic marriage." An expert witness, Mr. Janmeja (P. W. 4) who is a Professor of Sanskrit and claims to have studied the Vedas as well as the holy books of the Arya Samaj sect said, with great clearness:—

"The words 'Vedic marriage' and 'Arya Samaj marriage' mean the same thing. Among the ceremonies of marriage are acceptance of hand (*panigrahan*), promise or oath (*partigya*) and walking together for seven steps (*saptrapadi*.)"

Upon this evidence, there need be no hesitation whatsoever in holding that the marriage in question was a Vedic marriage, of the kind which among Hindus, of whom the Arya Samaj form a sect, creates a bond which their personal law regards as indissoluble. Nor is there the least ground for thinking that such a marriage tie is altered in this respect by any agreement *inter partes* supported or not as the case may be by legal sanctions (such as are imported by the couple also undergoing a ceremony of marriage under the Special Marriage Act, 1872), or by a rule of the sect to which the parties belong, that the marriage shall be monogamous. The bond will also remain unaffected by the conversion subsequently of one of the parties to Christianity, as has already been seen, except to the extent provided by the Native Converts Marriage Dissolution Act, 1866. Does the mere fact of such conversion of one of the parties render the marriage susceptible of dissolution under the Indian Divorce Act? The fact of one of the parties being a Christian, at the time when a petition is brought under the latter Act is no doubt essential to give the Court jurisdiction to entertain the petition, but for the grant of relief it is necessary under S. 7 that the other conditions, upon which alone the Divorce Court in London will grant similar relief, should be satisfied. (The case obviously does not fall under the proviso to that section.)

[12] One of these conditions is that the marriage should be monogamous. On this point there is no authority in the shape of two recent decisions, one by a Division Bench of the Calcutta High Court in the case published in A. I. R. 1943 Cal. 146,³ in an appeal from a decision of a District Judge rejecting a petition for dissolution of marriage, and the other by a Single Judge of the Divorce Court in London, in a suit for nullity, the judgment being published in (1946) 174 L. T. 63.⁴ In the former case the parties had undergone a ceremony of marriage in two forms. The first ceremony was under the Special Marriage Act, 1872, and the learned Judges of the Calcutta High Court held quite clearly that this resulted in a valid marriage. Under S. 17, Special Marriage Act, 1872, marriages performed under that Act are amenable to the provisions of the Indian Divorce Act. Therefore, so far at least

as that marriage was concerned, it was plain that it could be dissolved under the Divorce Act. The learned Judges of the Calcutta High Court also considered what would be the position if the former marriage was not valid and the subsequent religious ceremony which was performed in accordance with the rites of the Arya Samaj were valid. The conclusion reached was that as found by the District Judge on the evidence led before him, an Arya Samaj marriage is monogamous and "there is nothing even in S. 7, Divorce Act, to bar relief." Speaking with great respect, I feel it necessary to remark that the matter was [not?] quite so simple. First of all, the question would arise whether in view of the fact that the parties were already legally married, the religious ceremony was of any effect. Secondly, assuming that it was effective, the question would arise whether, in view of the personal law of the parties at the time of the marriage, namely, the Hindu law, the marriage was dissoluble at all. It has been seen already that if parties who are Hindus are married in the Vedic form, the mere fact of one of them subsequently embracing Christianity does not affect the nature and quality of the marriage tie. Consequently, assuming that there is in the Bengal Presidency a statute similar to the Punjab Laws Act, in the relevant respect, I apprehend that the validity and indissolubility of the religious marriage between the parties in the case before the Calcutta High Court might readily have been asserted by means of a suitably framed declaratory suit in the ordinary civil Courts. Unless the person interested in obtaining dissolution of the marriage could show that under some custom applicable to him, the marriage was susceptible of dissolution, and the conditions necessary for its dissolution under that custom had been established, I cannot see any ground upon which such a suit would fail. The decision in the Calcutta case proceeded on the tacit assumption that the Divorce Court in London would always give relief in respect of any marriage before it which was proved to be monogamous. That belief may perhaps be regarded as being justified by the decision in (1946) 174 L. T. 63,⁴ which may now be briefly considered. There, the facts were that the petitioner who was the wife in the case was a European, and had followed the respondent one R. M. Mehta at his request to Bombay, where she was converted to Hinduism as a member of the Arya Samaj on 15.2.1940. She denied that at the same time as she underwent the conversion ceremony, she also went through a form of marriage according to Hindu rites with the respondent, as was alleged by the latter. The petition was undefended, and the learned Judge concluded on the evidence before him that the petitioner never had any

intention to marry the respondent, and "that the ceremony she went through was merely a fraud perpetrated upon her by the respondent." A decree of nullity was asked for, and this was awarded, on the basis of the finding that there had been no valid marriage performed. The learned Judge further examined the question whether a Hindu marriage according to the rites of the Arya Samaj sect was monogamous, as that was a necessary condition of the exercise of the jurisdiction which was invoked. Relying upon the statement of an expert witness namely Sir Alfred Wort, at one time a High Court Judge in India, the learned Judge came to the conclusion that the Arya Samaj sect which he regarded as similar "except for fine distinctions" to the Brahmo Samaj sect had one tenet of faith in common with the latter sect, viz. "that a marriage contracted according to that faith must be monogamous." It is very important to note that the relief by way of dissolution of the marriage tie was neither sought nor granted in that case. The finding that the marriage was monogamous was reached, so far as I can see, solely in order to determine that the Court could adjudicate upon the marriage, and grant relief. It is evident that for the purpose of dissolving the marriage, it would have been necessary for the learned Judge to enquire clearly into a further question, namely whether a marriage performed in the circumstances of the case, between the parties who were Hindus and were being married according to the rites of the Hindu religion could be dissolved at all. To reach a conclusion upon this point, it would have been necessary to investigate the *lex loci* to which the Divorce Court in London has always attached great importance in cases of this kind. As was stated in (1879) 5 P. D. 94,⁶ marriage "is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration." (1874) 31 L. T. 638⁷ is a case in which a marriage performed in Armenia by a Roman Catholic priest according to Roman Catholic rites between a man who was a Roman Catholic and a woman who was a Protestant was held to be invalid, because under Persian law prevailing in Armenia, Christian marriages were only recognised if they were valid according to the religious denomination of the parties, and that condition was not satisfied in relation to the marriage in the case. Such a marriage if performed in England would no doubt have been recognised as valid. There is no reason why the same principle should not be applied for accepting the incidents of a marriage performed outside England. Taking the converse case, in (1917) 1 K. B. 634,⁸ where a Mohammedan married an English woman at a registry office in England, and later

pronounced divorce by the method of *talak* against her, and subsequently sought to obtain a licence to marry another English woman, the licence was refused by the Registrar, whose action was upheld up to the Appeal Court on the ground that the first marriage still subsisted; in his judgment in the King's Bench Division, Lord Reading C. J., observed that even if a decree of dissolution had been granted by a Court of competent jurisdiction in the country of the domicile, such a decree, if based on *talak*, would not necessarily be accepted as valid by the English Courts. The supremacy of the *lex loci* in cases of this kind is well illustrated by the case in (1868) 3 H. L. 55,⁹ where the couple had been married in England, and subsequently the husband having committed adultery, went to Scotland in order to allow his wife to divorce him according to the Scottish law which unlike the English law regarded a husband's adultery as a sufficient ground for divorce. In the House of Lords, it was held that the husband had no *bona fide* domicile in Scotland and therefore the decree of the Scottish Court was without jurisdiction, and in the course of his judgment, Lord Cranworth observed as under :

"This country cannot admit any right in the Scottish Courts to interfere with the inviolability of an English marriage."

I cannot see any ground for doubting that the Divorce Court would for the same reason decline to make a decree for dissolution of a Hindu marriage if that Court were satisfied that the marriage had been performed according to Vedic rites in a Country where the Hindu law was the law of the land, and rendered such a marriage indissoluble.

[13] The evidence led in this case to show that the marriage between the parties was a monogamous marriage may now be briefly considered. The priest who performed it namely Pandit Jagat Ram Sharma declared when examined for the second time, after the issue of the monogamous nature of the marriage had been pointedly raised, that he told the parties when performing the ceremony that the marriage was monogamous, and they accepted this statement. He as well as two other witnesses, namely Mr. Janmiga and Pandit Yash Pal (P. W. 6) have declared that it is a point of distinction between an Arya Samaj marriage and an orthodox Hindu marriage that the former marriage is monogamous. Certain texts out of Arya samajic scriptures have been cited in support of this view, but as to this it should be stated that the texts themselves declare that the view which they set out is based upon the earliest Vedas and Sastras, and in actual fact, it is found that the vast bulk of the Hindu population in India has over a

great number of years, interpreted and acted upon the same Sastras and Vedas in a different sense. There is, therefore, strong reason for exercising caution in accepting the dicta of the witnesses produced by the petitioner in this undefended case. A favourable conclusion might have been reached more easily if there had been any evidence to show that as a matter of practice, the religious ceremony is preceded by some form of enquiry, or as among the Christians, some form of publicity, at religious gatherings enabling persons who are aware of any impediment to the marriage, such as that one of the parties is already married to make this fact known to the priest concerned. The present was a case in which such precautions were undoubtedly very necessary. The woman was just being converted from Christianity to Hinduism, and it may be presumed that her antecedents were unknown to the officiating priest, it was, therefore, very necessary in order to avoid the possibility of bigamy being committed that some enquiry should have been made, at least from her. What is more, it proves that such an enquiry should also have been made from the man, for he has admitted before us that at the time when he went through the ceremony of marriage with Miss Peggy Bean, he was already married, and his first wife was living. I find it hard to believe that this earlier marriage was not performed according to Arya Samajic rites, as there is nothing on the record to show that the petitioner is himself a convert to the Arya Samaj. These facts made it quite plain that whatever the belief held by the witnesses who have deposed on the point, the practice in relation to such marriages is not of a nature which includes even the minimum precautions necessary for avoiding the possibility of bigamy. In these circumstances, it seems to me that in relying upon the statements of these expert witnesses, there is a danger of confusing what is advocated with what is enjoined, and perhaps also of mistaking what is merely discouraged for that which is absolutely prohibited. I would conclude that on the evidence in this case it would be most unsafe to hold that an Arya Samajic marriage is monogamous.

[14] The admission by the petitioner of a previous marriage, to which a reference has been made above, placed his counsel in an embarrassing position. He attempted to argue that the Indian Divorce Act was applicable to polygamous marriages, and that the only condition necessary for invoking its jurisdiction in respect of a marriage was that one of the parties thereto should be a Christian at the time when the petition is presented. This contention is clearly without force, for it is a fixed principle of the Divorce Court in England not to grant relief in relation to any

marriage which is not "a voluntary union for life of one man with one woman to the exclusion of all others" and this principle is binding upon this Court under S. 7, Divorce Act, which admits of only one exception namely where the matrimonial offence in relation to which relief is sought was committed at the time when both parties were Christians. That is clearly not the case here. It was then pleaded by learned counsel for the petitioner that his client should be granted a decree of nullity on the ground that the second marriage being monogamous in its nature was void, as he was already married. In view of the uncertainty whether the marriage in the case was really monogamous, it is not possible to consider the grant of this relief, which would in any case involve a recasting of his whole case by the petitioner. The fact that he would be seeking nullity on the ground of his own wrong might operate to bar such a petition under the maxim *ex turpi causa non oritur actio*. Besides, the mere change in the relief sought would not cure the defect in this Court's jurisdiction. The marriage remains a Hindu marriage, despite the conversion of the respondent to Christianity, and in the circumstances of this case it can only be adjudicated upon by a Court administering the Hindu law. In this respect, there is a clear distinction between the plenary jurisdiction enjoyed by the Divorce Court in London, and the jurisdiction exercised by the Courts in the Punjab which are derived from statutes. Both by reason of its subject-matter being special, and because it is of later date, the provisions of S. 9 (5?) of the Punjab Laws Act prevail as against the Indian Divorce Act, in a case of this kind, and I am therefore of the opinion that a decree for nullity in respect of this marriage cannot be granted by this Court, but can only be granted by the Courts administering the Hindu law, i. e. the ordinary civil Courts, while a decree for its dissolution may be granted either by these Courts or by a Court acting under the Native Converts' Marriage Dissolution Act, 1866.

[15] I would accordingly refuse to confirm the decree granted by the learned District Judge, but would instead set it aside and dismiss the petition for dissolution.

V. R.

Petition dismissed.

*** A. I. R. (35) 1948 Lahore 135 [C. N. 45.]**
FULL BENCH

ABDUL RASHID, C. J., ABDUR RAHMAN, MAHAJAN, KHOSLA AND S. A. RAHMAN JJ.
Nasir-ud-din Shah v. Mt. Amatul Mughni Begum.

First Appeal No. 67 of 1944, Decided on 31-1-1947, from judgment of Abdul Rashid Ag. C. J. and Abdur Rahman J., D/- 28-6-1946.

(a) Dekkhan Agriculturists' Relief Act (1879), S. 2 — Onus of proof. (Per *Abdul Rashid Ag. C. J.* in *Order of Reference*)

Where the defendant derives income from agricultural and other sources, the burden lies heavily upon him to show that he is an "agriculturist" within the meaning of S. 2. [Para 5]

†(b) Mahomedan law—Dower deed not specifying portion of prompt and deferred dower—Portion should be decided by reference to custom and usage of wife's family and locality—In absence of such custom presumption is that it is half and half—Presumption is rebuttable.

Per *Full Bench*—When it is not stated in the *Kabinnama*, whether the payment of the dower is to be prompt or deferred, the custom or usage of the wife's family or of the locality is in the first instance to determine what portion of the unspecified dower is to prompt and what deferred and in the absence of proof of any custom a presumption may be raised that one half of the amount stipulated was prompt and the other half deferred, but this presumption can be rebutted by either party and the proportion may be increased or reduced in accordance with the circumstances of each individual case. In considering those circumstances the status of the wife and the amount of the dower must be taken into consideration: 19 W. R. 315 (P.C.), *Disting.*; *Texts and case law considered*. [Paras 57 and 63]

Cases referred :—

1. ('11) 35 Bom. 266 : 10 I. C. 814, Kashinath v. Vinayak Gangadhar.
2. R. F. A. No. 38 of 1941, Mt. Bibi Kesri Begum v. Hakim Mahomed Avil Khan.
3. ('73) 19 W. R. 315 : 2 Suther 823 (P. C.), Mirza Bedar Bukht Mohummed Ali v. Mirza Khurram Bukht Yahya Ali.
4. ('38) I. L. R. (1938) Mad. 609 : 25 A. I. R. 1938 Mad. 107 : 172 I. C. 708, Mahomed Rowther v. Ayesha Bivi.
5. 1 S. D. A. Rep. 276, Umdat-un-Nisa Begum v. Mirza Asud Ali.
6. 1 S. D. A. Rep. 48, Ghulam Husan Ali v. Zeinub Beebee.
7. ('40) 27 A. I. R. 1940 P. C. 230 : I. L. R. (1940) Lah. 685 : I. L. R. (1940) Kar. P. C. 447 : 67 I. A. 464 : 191 I. C. 548 (P. C.), Punjab Co-operative Bank Ltd., Amritsar v. Commr. of Income-tax, Lahore.
8. (1901) 1901 A. C. 495 : 70 L. J. P. C. 76 : 85 L.T. 289 : 50 W. R. 139, Quinn v. Leathem.
9. ('70) 6 Mad. H. C. R. 9, Tadya v. Hasanbliyai.
10. (1900) 23 Mad. 371 (F. B.), Masthan Sahib v. Assan Bivi Ammal.
11. ('75-77) 1 All. 483, Eiden v. Mavhar Hussain.
12. ('75-77) 1 All. 506, Taufik-un-Nisa v. Ghulam Kambar.
13. ('11) 33 All. 291 : 9 I. C. 200, Umda Begam v. Muhammadi Begam.
14. ('19) 41 All. 562 : 6 A. I. R. 1919 All. 280 : 50 I. C. 740, Mahomed Subhan Ullah v. Mt. Saghrunnissa Bibi.
15. ('31) 18 A. I. R. 1931 All. 403 : 131 I. C. 115, Mt. Maimuna Begum v. Sharafat Ullah Khan.
16. ('34) 21 A. I. R. 1934 All. 441 : 149 I. C. 1211, Mangat Rai v. Mt. Sakina Begam.
17. ('41) 28 A. I. R. 1941 All. 181 : I. L. R. (1941) All. 326 : 195 I. C. 353, Mahomed Taqi Ahmad Khan v. Farmoodi Begum.
18. ('43) 30 A. I. R. 1943 All. 184 : I. L. R. (1943) All. 295 : 207 I. C. 519, Bibi Rehanakhatun v. Iqtidar Uddin Hasan.

19. 3 S. D. A. N. W. P. 185, Meriameennissa Begum v. Imdadee Begum.

20. (1865) 2 Bom. H. C. R. 291, Fatima Bibi v. Sadruddin.

21. ('11) 35 Bom. 386 : 11 I. C. 558, Husseinkhan Sardarkhan v. Gulab Khatun.

22. ('29) 8 Pat. 645 : 16 A. I. R. 1929 Pat. 207 : 117 I. C. 207, Mt. Bibi Mahbooban v. Md. Amirruddin.

23. ('80) 109 P. R. 1880, Karim Bibi v. Vilayat Ali.

24. ('91) 5 P. R. 1891, Mt. Aisha Bi v. Mahomed Sadiq.

25. ('20) 1 Lah. 597 : 7 A. I. R. 1920 Lah. 328 : 60 I. C. 88, Mt. Fatima Bibi v. Nur Mahomed.

26. (1836) 1 M. & W. 466, Hutton v. Warren.

Fazal Rahman and Manzur Qadir—for Appellant.
Amar Nath Grover and Sant Ram Tandon—for Respondent.

ORDER OF REFERENCE [28-6-1946]

Abdul Rashid Ag. C. J.—This is a first appeal preferred by the defendant from a decision of Mr. Masood Ahmed, Sub-Judge, first class, Delhi, decreeing the plaintiff's claim.

[2] The facts of the case are few and simple. Sardar Nasir-ud-Din Shah defendant got married to Mt. Amtul Mughni Begum plaintiff at Delhi on 3rd June 1940. In the *kabinnama*, which was executed at the time of the Nikah, it was stated that Rs. 15,000 on account of dower was due from the defendant to the plaintiff. The plaintiff accordingly instituted the present suit for recovery of a sum of Rs. 15,000 on account of dower. The allegation of the plaintiff was that the entire dower was payable on demand, that as the marriage had been solemnized at Delhi the Courts of the Delhi Province had jurisdiction to hear the suit and that a decree may be passed against the defendant for a sum of Rs. 15,000.

[3] The defendant pleaded, *inter alia*, that he was governed by the Dekkhan Agriculturists' Relief Act of 1879, and that by virtue of ss. 9 and 11 of that Act the Courts at Delhi had no jurisdiction to hear the suit. The factum of marriage was admitted but it was denied that the defendant was liable to pay any sum on account of dower. The defendant stated that no dower was settled at the time of the marriage, though a sum of Rs. 15,000 was agreed to be shown as nominal and fictitious dower in the *kabinnama* Ex. P-1. In the alternative he pleaded that it was agreed between the parties that this dower would not be claimed. He also alleged that the whole of the dower, if found to be payable, was deferred dower and it could not, therefore, be claimed by the plaintiff until divorce or the death of the defendant. The trial Court framed a preliminary issue to the effect whether the suit was not triable by the Delhi Courts in view of the provisions of the Dekkhan Agriculturists' Relief Act. By its order date 1st February 1943, the trial Court held that the

defendant was not an "agriculturist" within the meaning attached to that term in the Dekkhan Agriculturists' Relief Act. On the merits the trial Court held that Rs. 15,000 had been fixed as the dower due to the plaintiff and that as it was not stated in the kabin-nama whether this dower was prompt or deferred, the whole dower must be regarded to be prompt. On these findings the trial Court decreed the plaintiff's claim in its entirety. Against this decision the defendant has preferred an appeal to this Court.

[4] The learned counsel for the appellant contended that the order, dated 1-2-1943, holding that the defendant was not an "agriculturist" was erroneous. The learned counsel urged vehemently that it had been established on the record that the defendant was an agriculturist as defined in S. 2, Dekkhan Agriculturists' Relief Act. The definition of agriculturist so far as it is relevant to the present case, is in the following terms :

'Agriculturist' shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits."

[5] It is obvious that the burden of proving that the defendant is an 'agriculturist' lay heavily upon him. The only evidence produced by the defendant in support of his claim is his own oral statement. The defendant does not allege that he is earning his livelihood wholly from agriculture. His case is that he earns his livelihood principally from agriculture and also engages personally in agricultural labour.

[6] The defendant has made a long statement in Court deposing that he is Qazi and first class Sardar of the Ahmedabad District. He asserts that a first class Sardar can only be a person whose income from land is not less than Rs. 15,000. According to him his yearly income from land is between Rs. 25,000 and Rs. 27,000, and from rents of house property between Rs. 10,000 and Rs. 12,000 per annum. When cross-examined he stated that he has heard from various persons that a person can be made a first class Sardar only if his income from land is not less than Rs. 15,000. His principal source of information is Chand Mian, the manager of his estate. Chand Mian was not produced as a witness. No rules of Government were produced or referred to showing that the minimum income of a person from land must not be less than Rs. 15,000 before he is created a Sardar of the first class. The defendant stated that he does not maintain any book of account in which income from agricultural land may be recorded. He further states

that his manager Chand Mian does not maintain any books of account. This statement appears to me to be incredible. If a person has extensive landed property and if he leaves the management of his property solely to his manager, it seems most unlikely that the manager should have no writing at all showing the annual income of the estate which he manages. The defendant states that his manager hands him the income of the estate in three or four instalments every year. If so, the manager must have been taking some sort of a receipt from the defendant in order to safeguard his own interests. If the defendant does not keep any accounts, it was open to him to produce the Patwari or the Girdawar Qanungo to prepare an estimate of annual income from his lands according to the rates prevailing in the neighbourhood if his estate during the last five years. This procedure is adopted by a number of litigants who own extensive lands and who do not possess any accurate account books showing their agricultural income. The defendant has put on the record a number of extracts of record of rights, marked as Exs. C-14 to C-103. These documents show that the defendant and his brother Kamal-ud-Din have been recorded as owners in equal shares of a large area of land amounting to 500 or 600 bighas. They, however, further show that most of these lands are personal inam lands. No effort has been made by the production of these documents to give even a rough estimate of the income derived by the defendant from these lands. For instance, several documents show that large area of the lands belonging to the defendant are uncultivated but produce some grass. It has not been shown whether this grass is a marketable commodity in this neighbourhood. If the lands are situated at a great distance from a town, it might be that the cost of the carriage of this grass to the market would be much more than the price realized by the sale of grass. The documentary evidence placed on the record by the defendant is, therefore, of no assistance whatever in determining what income does he derive from his lands.

[7] The defendant deposed that the average annual rental income of Nasir Palace, which is a large building situate in the town of Bombay belonging to the defendant, was Rs. 7,000 to 8,000 per annum. He was cross-examined on this point and was confronted with the receipt of the municipal tax of this building amounting to Rs. 1,706 per year. According to this document the annual rental value of the building comes to Rs. 15,270. It is admitted by the defendant in his statement that besides the income from the Bombay property, his income of rent from the remaining house property situate in Ahmedabad

amounts to Rs. 4,000 per annum. This income, however, has been assessed by the Ahmedabad Municipal Committee at a sum of Rs. 7,000. It appears to me, therefore, that the annual income of the defendant from house property exceeds Rs. 20,000 while there is no reliable evidence on the record to determine his annual income from the lands even approximately. Even if the annual income of the defendant from agricultural land be taken to be Rs. 25,000, it must be remembered that half of the lands belong to his brother Kamal-du Din. His agricultural income would, therefore, amount to about Rs. 12,000 or 13,000. In this aspect of the matter also he cannot be regarded as an agriculturist as he does not earn his livelihood wholly or principally by agriculture.

[8] It further appears to me from the documentary evidence referred to above that the greater part of the lands are *inam* lands. In 35 Bom. 266¹ it was held that the income derived from tenants by an *inamdār* must be excluded from consideration in finding out the agricultural income of a person who claims to be an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act. Be that as it may, I am definitely of the opinion that the defendant has not succeeded in establishing even approximately as to what income he derives from agricultural land. As he has considerable income from other sources, he cannot be regarded as an agriculturist for the purpose of the Dekkhan Agriculturists' Relief Act.

[9] The next point urged by the learned counsel was that if it is not stated in the kabin-nama whether the dower is prompt or deferred, the whole dower must be regarded as deferred or in any case more than one-third of the dower should not be held to be prompt. Reliance was placed in this connection by the learned counsel on the case in R. F. A. No. 38 of 1941,² decided by Beckett and Bhandari JJ. on 11-5-1944. With all respect to the learned Judges, I am of the opinion that this judgment requires reconsideration, as there are a number of observations in this judgment which appear to run counter to the observations made by their Lordships of the Privy Council in 19 W. R. 315.³ Reference may also be made in this connection to I. L. R. (1938) Mad. 609.⁴ The last case was decided by a Division Bench of the Madras High Court of which my learned brother Abdur Rahman J. was one of the members. I would, therefore, refer the following question to a Full Bench for decision :

"When it is not stated whether the payment of the dower is to be prompt or deferred, should the dower be held to be payable on demand in whole or in part?"

[10] After the Full Bench has determined the

question referred to above, the case will be remitted to this Division Bench for a decision of the other questions involved in this appeal.

[11] The learned counsel for the respondent submitted that this case should be fixed for hearing before a Full Bench in October, if possible. This request is reasonable and may be given effect to.

[12] *Abdur Rahman J.* — I agree.

[The question coming before a Full Bench consisting of *Abdur Rahman*, *Achhru Ram* and *Mahajan J.J.*, was referred by its order dated 11th November 1946, to a larger Bench which delivered the following judgment on 31-1-1947.]

[13] **Abdur Rahman J.** — There being a divergence of judicial opinion mainly between the Madras High Court on the one hand and the remaining Indian High Courts on the other, this Bench has been constituted to answer the following question :

"When it is not stated whether the payment of the dower is to be prompt or deferred, should the dower be held to be payable on demand in whole or in part?"

[14] A contract of marriage amongst Muslims (called *nikah* which literally means to unite) is not merely a civil contract but is regarded by Muslim Jurists to be in the nature of a secular contract partaking of the nature of '*ibadat*' or piety. That is why as stated in volume 2 at p. 2 of (Kifayah) (Ahmadi Press Delhi) the Prophet of Islam declared what is generally repeated before *nikah* :

[Text quoted from original source omitted — Ed.] "(According to the Prophet, on whom be peace, marriage is my Sunnat and those who do not obey it are not amongst my followers.)"

That is why there is a consensus of opinion that *nikah* is *Sunnat Muvakidah*. The following famous Hadis is reported at p. 7, in *Sahih Bukhari* (Amiriyah, Bulaq) and at p. 568 of *Sahih Muslim* (Darul 'Kutubil' Arabiyah, Cairo), the foremost and as their titles indicate the correct books of Hadis :

[Text quoted from original source omitted — Ed.] "(A woman is married for four things or qualifications (1) for her property; (2) her nobility of family or pedigree; (3) her beauty and (4) on account of her piety. You must take possession (marry) for piety.)"

Really a *nikah* between Muslims was meant to bring peace of mind to both the spouses and to promote love and affection :

[Text quoted from original source omitted — Ed.] "Al-Quaran, Part XXI, Ch. XXX. (He created mates for you out of yourselves (i. e., class or species) so that you may find peace and He put love and kindness between you)."

[15] I have tried to explain the conception of marriage amongst the Muslims with the object of repelling the contention advanced by learned counsel for the respondent that dower forms the consideration of marriage.

[16] The Siraj-ul-Wahhaj thus sums up the position :

[Text quoted from original source omitted — Ed.]
“(Marriage legalises the mutual enjoyment of parties in a manner permitted by law. Thus says the Fath-ul-Qadir. It subjects the wife to the husband's power of restraining her. It prevents her from going out and showing herself in public. It imposes on the husband the duty of paying her dower and of maintaining and clothing her. It establishes on both sides the prohibition of affinity and the right of inheritance.)”

It would, therefore, follow that the husband's duty to pay dower flows from the tie of marriage similar to his duty of providing maintenance and raiment. And if the latter two cannot be regarded as consideration for marriage and are only given out of consideration and respect for the wife, equally is dower not to be regarded as its consideration as that term of art is understood by English lawyers. I may, however, point out that this question, as expressed by some of us at the time of arguments, does not, strictly speaking, arise for determination in this reference for in any case an agreement to pay dower to the wife cannot be held to be without consideration. Had it not been so, the omission to specify any dower would have affected the validity of the contract of a marriage. Hedaya says at p. 303 (Yusufi Press, Lucknow) :

[Text quoted—Ed.] “(A contract of marriage is valid though no dower has been mentioned or even if a woman is married on the condition that no dower would be payable to her).”

It must, therefore, follow that if no dower is mentioned, a certain amount of dower would still have to be payable by the husband as a condition flowing from the marriage and in spite of a contract to the contrary although the method of ascertaining his liability would be a different one.

[17] The question referred to us for decision is based on the assumption that a certain sum of money was agreed to be paid by the husband to the wife at the time of their marriage. The liability to pay that amount is not being, and cannot be, disputed when the marriage is found to have been consummated, (as stated in Durr-ul-Mukhtar at p. 206 (Calcutta edition) :

[Text quoted from original source omitted — Ed.]
“(Dower becomes payable on co-habitation, valid retirement (from which cohabitation is to be deduced) or death of one of the spouses.)”

In the absence of a definite contract, however, as to when that had to be, or would have to be, discharged, the plaintiff contends that the whole of it has become payable in consequence of a demand while the defendant contends that the whole of it must be taken to be deferred when the plaintiff had allowed the marriage to be consummated without demur even if he was unable to establish that the parties had expressly agreed to its payment after dissolution or death.

[18] The contract being silent as to the time

of its discharge or payment, the question has been answered by different Courts in more than one way. The majority of the High Courts (Allahabad, Bombay in an earlier decision although a later decision seems to have taken a slightly different view, Patna and Lahore) have taken the view that a certain portion of the dower fixed between the parties at the time of marriage is payable on demand while the Madras High Court has in three decisions (to one of which I was a party myself) held the whole to be payable on demand. In doing so, however, reliance was largely placed on a decision of their Lordships of the Privy Council in 19 W. R. 315.³ The first question that falls to be decided, therefore, is which of the two views is correct.

[19] Learned counsel for the appellant has drawn our attention to the opinions of a large number of Muslim Jurists of renown in support of his contention that the *urf* or custom of the locality must be imported into the contract as a condition before the question whether the whole or any portion of dower is exigible can be correctly decided. Since the Muslim Jurists have consistently recognised the force and validity of custom and considered it to be an important source of law, as stated in Bahr-ur-Haiq at p. 178 in Vol. 3 (Darul Qutubil Arabiyah) :

[Text quoted from original source omitted — Ed.]
“(And the custom has got to be seen for what is established by custom is to be taken as established by way of a condition of the contract),

a great deal of stress was laid on behalf of the appellant to this aspect of the case. Learned counsel for the respondent has on the other hand contended that in the absence of any specification as to the time of its payment the whole of the dower must be deemed to be prompt and in support of that contention he has placed his reliance on the text of the Holy Quran and on the opinions of some of the Muslim Jurists.

[20] Had the answer to this question been given by the Holy Quran, there would have been no differences amongst the Muslim Jurists and the question would not have come up before this Court for decision. There are only three words in Ch. 4, Part 5 which were cited by the parties in support of their respective contentions: “Fatu-hunna Ujurahunna Farizatan” (so give them their reward as a part of duty). But these words only mean and define the duties of the husband to pay the *ajr* (reward) to the wife without fail. Nothing is said, however, in regard to the quantum of *ajr* or when it is to be paid. If there is a contract to pay it at any particular time, it would be payable at that time. If the whole of the dower is found to be exigible, it would be payable on demand and if the whole of it was found to be deferred (*muwajjal*), it would be payable as

agreed upon between the parties. The *ajr* or *miad* or the time when it is payable need not necessarily be the determination of marriage by death or divorce although in the absence of a specific contract as to *ajr* it would have to be presumed to be so. It could be for instance deferred for a period of 5, 10 or 20 years and as soon as the time for the performance arrived it could be demanded. No other text of the Holy Quran was cited by the parties but since I find it stated in Part 4, Ch. 4 : (Text quoted—Ed.) (And give women their dowers freely), my method of approach to the case must necessarily be liberal towards the wife and she must be paid 'freely' what is found to be due to her.

[21] In the absence of any text from the Holy Quran and in the absence of any precept by the Prophet (Hadis) (none of any relevancy having been cited by either party), one must necessarily go to the third source of Mahomedan law which is '*ijma*'.

[22] It seems to me advisable at this stage to explain what '*ijma*' is. Basing his opinion on Taudih p. 498, Mukhtser, Vol. 2, p. 23 and Jamul Jawami, vol. 3, p. 288, Sir Abdur Rahim in his admirable work on Mahomedan Jurisprudence defined it as agreement of the (Muslim) Jurists among the followers of Muhammad (Prophet of Islam) in a particular age on a question of law. Unanimity is not, however, essential particularly when a different opinion is expressed by some of the Jurists in a subsequent age. According to Kashful Asrar (Vol. 3, p. 262), Mukhtaser, Vol. 3, p. 262) and other authorities, Ibn Jarir, Abu Bakari Razi and some Mutazelis are said to have held the view that

"'*ijma*, of the majority of the Jurist is of absolute authority, even though they do not question the qualifications of the dissentient minority The Hanafis, Shafeis and the Malikis hold that if the number of dissentients be not large, the view of the majority will be valid and binding authority, though not absolute in the sense that a person disputing it would become an infidel."

Relying on Taudih and Jamul Jawami, Sir Abdur Rahim adds at p. 127 that

"according to the generally received Sunni view, when a question is determined by consensus of opinion, it is not open to individual Jurists of the same or subsequent age to come to a different conclusion except when the matter is one in which some Jurists before the formation of the '*ijma*', were known to have entertained a different view, or a Jurist, a party to the '*ijma*' happened afterwards to change his view.

It is true that '*ijma*' of one age may be altered or repealed by '*ijma*' of a subsequent age with the exception that the '*ijma*' amongst the companions of the Prophet is incapable of being repealed"

I have in this connection fully quoted from Sir Abdur Rahim's Mohammadan Jurisprudence and his comments from pp. 115 to 136 are instructive and may be referred to with advantage.

[23] In order to appreciate the arguments on the ground of '*ijma*' one must necessarily refer

to the dicta of well-recognised Muslim Jurists of the Hanafia sect.

[24] Learned counsel for the appellant has relied in support of his contention on

- (a) Fatawa Qazi Khan, p. 352,
- (b) Mukhtaser-ul-waqayah, p. 151,
- (c) Sharh-ul-waqayah, vol. 2, p. 45,
- (d) Fatawa Basazia, vol. 1, p. 150,
- (e) Ashbah Wan Nazair with Sharh-i-Hamvi, p. 230,
- (f) Bahr-ur-Raiq, p. 178,
- (g) Sharn-un-Muqayah, vol. 2, p. 19,
- (h) Tanwir-ul-Absar, p. 389,
- (i) Radd-ul-Muhtar, p. 389, commonly known as Fatawa Shami,

(j) Fatawa Alamgiri, vol. 1, pp. 338-339, by about 60 Ulema selected from India.

Reliance was also placed on Chelapi's commentary on 'Inayah' by Chelapi where the commentator stated that the answer in Inayah was opposed to all other works of authority.

[25] Learned counsel for the respondent has on the other hand relied on

- (a) Inayah, vol. 2, p. 474,
- (b) Darr-ul-Mukhtar, p. 389, a commentary on Tanwir-ul-Absar, and
- (c) Hammadiyah, vol. 1, p. 89.

[26] There is no doubt that the authorities cited by the learned counsel for the parties after considerable research, to whom we must acknowledge our indebtedness, do represent the various ages in which the point of view stated by them prevailed. In order to ascertain their respective views as expressed by the learned Jurists or Commentators I must refer briefly to their histories and quote what they have said on the relevant question.

(1) Fatawa Qazi Khan (also known as Khaniab) is by Imam Fakhrud-Din Hasan son of Mansur Unjandi of Parghana commonly known as Kazi Khan. Born in Uzjand in Labbahan in A. H. 515, he grew to be a great Jurist and has been described by several authors of repute, old as well as modern, as one of the *mujtahidin* (independent expounders of Muslim Jurisprudence). He was also a Qazi and is reported to have died in A. H. 592. He observed at p. 352 as follows : [Text quoted from original source omitted—Ed.]

"If no one has stated (witnesses) (with regard to prompt or deferred) then the woman and the dower fixed shall also be looked at. It would be seen as to what portion of Mehr of this kind should be prompt for a woman of this type. The same portion should be considered as prompt. The prompt shall not be fixed 4th or 5th but most certainly regard shall be had to '*urf*', because what is established by '*urf*' is considered to be a (condition of the contract)."

(2) Mukhtaser-ul-Waqayah.

(3) Sharh-ul-Waqayah. These works were written by Ubaidullah bin Masud bin Tajush Shariab

and commanded a great respect amongst the Ulema. He died in A. H. 744.

The following passage appears in Mukhtaser-ul-Waqayah on p. 151 : [Quotation from original source omitted—Ed.]

"If stated Muajjal or Mowajjal i. e. prompt or deferred, then the same would prevail, and if not stated, then *urf* would be relied upon."

The same opinion is expressed in Sharh-ul-Waqayah at p. 45 in v. 2 : [Quotation from original source omitted—Ed.]

"If not stated, it is written in the book Mukhtaser, that if stated prompt or deferred, then it would be according to what was stated, but if not stated then it would be according to '*urf*'."

(4) Fatawa Bazaziah, p. 150: The author of this highly reputed work is Sheikh Hafizuddin Muhammad bin Muhammad bin Shahab *alias* Ibn-i-Bazazian Al Hanafi. It is stated in vol. 2, p. 49 in Kashfuz Zunan that the author collected a number of *fatawas* in his work and preferred what appeared to him to be the most reliable and that his work is regarded by most of the learned men as authoritative. This work was compiled in A. H. 812 and he died 15 years after. [Quotation from original source omitted—Ed.]

"She can deny her person until she gets her *mehr* in full for when it is stated at the time of *nikah* what is prompt then she is entitled to demand, and if not stated then the *mehr* fixed shall be looked at and the woman shall also be looked at to know what portion of such *mehr* is taken as prompt for a woman of such type and what portion is taken as deferred, and decision will be given according to '*urf*' and orders will be given for the demand of that portion."

(5) Ashbah Wan Nazair. (6) Bahr-ur-Raiq. These were written by Zainul Abidin bin Ibrahim commonly called Ibn Nujaim. He was a scholar of repute and author of numerous works of which 23 are enumerated in Brooke, vol. 2 at p. 310. Out of these, the two cited before us are very well known. He died in A. H. 970.

Ashbah Wan Nazair contains the following passage at p. 229 : [Quotation from original source omitted—Ed.]

"And it is considered in our age and our country as to what portion of such a *mehr* is taken as prompt for a woman of her type."

A commentary of this work was written by Hamavi. He states as follows : [Quotation from original source omitted—Ed.]

"The prompt portion of such a *mehr* is considered for a woman of her type i. e. if it is not stated at the time of *nikat* as to what portion of the *mehr* will be prompt, then the *mehr* fixed will be looked at and the woman will also be looked at. It will be considered as to what portion of such *mehr* is taken as prompt for a woman of her type. It will be decided according to '*urf*' (custom) and orders will be given for the demand of that portion. The same is stated in Bazaziah".

The passage appearing at page 178 (part 2) in Bahr-ur Raiq reads as hereunder: [Quotation from original source omitted—Ed.]

"It is in Fatwa Sarifia that Fatwa will be given according to the '*urf*' of the City without reference to

3rd or half portion as we have stated. Then what is stated in Ghayat-ul-Bayan regarding the application of this dictum (i. e. if *mehr* is fixed with a condition of its being prompt or stated nothing whether prompt or deferred, then the same will be payable at once) is a cursory statement. But the correct Fatwa is that where it is not stated whether the dower is prompt or deferred then the '*urf*' shall be more worthy of respect."

(7) Sharh-un-Nuqaya, vol. II, p. 19: This commentary was written by Ali bin Sultan Muhammad-al-Harvi *alias* Qari Hanafi. He was born in Herat and then went to Macca where he lived until his death which occurred in A. H. 1014. He was one of the great scholars of his age. He writes to the following effect: [Quotation from original source omitted—Ed.] Prompt and deferred:—

"If stated whether it is Muajjal or Mowajjal then it would be accordingly, and if not then it would be according to '*urf*'"

(8) Tanwirul-Absar, p. 389 : This was written by Shamasud Din, son of Abdullah son of Abdul Khatif of Tamaratash-al-Ghazzi. He was a leading Faqih of his time. Born at Ghazza, he received his education there in the first instance. He went to Cairo four times to complete it and returned to his native place after receiving his instructions from Zain, son of Nujaim, author of Bahr-ur-Raiq and from Ali son of Hinai the Qazi-ul-Quzar of Egypt. He died in A. H. 1061.

It contains the following statement: [Quotation from original source omitted—Ed.]

"Part of it will be prompt according to '*urf*'".

(9) Radd-ul-Mohtar commonly known as Fatwa Shami: This is a well known annotation of Tanwir-ul-absar. It was written by Muhammad Amin bin Umar Ash Shami, commonly called Ibn Abedin. He was a scholar of renown and died in A. H. 1252. [Quotation from original source omitted—Ed.]

"And if not stated prompt or portion of it prompt, the woman can deny till she gets according to custom prompt portion. It is in Serfia that Fatwa will be given according to the *riwaj* of their City and 3rd or half will not be relied upon. It is in Fatwa Khaniah that '*urf*' shall be believed because '*urf*' if proved is like a condition of the contract."

(10) Fatwa Alamgiri. A famous work of Muslim Jurisprudence (also known as Fatwa Hindi-yah). It was compiled by a group composed of about sixty Indian scholars selected from all over India under the command of Emperor Aurangzeb (A. H. 1069-1118). The work was prepared under the supervision of Sheikh Nizam an eminent scholar of Surhanpur (Gujrat). Undoubtedly, it expounded the law as it prevailed at the time of Emperor Aurangzeb and his successors and is still regarded to be authoritative in India. The relevant passage at pages 338-339 (vol 1) reads as follows: [Quotation—from original source omitted—Ed.] Rendered into English, it would read as hereunder:

"If no one has stated (witnesses) (with regard to prompt or deferred) then the woman and the dower

fixed shall also be looked at and it would have to be seen as to what portion of *mehr* of this kind should be prompt for a woman of this type. The prompt shall not be fixed 4th or 5th but most certainly regard shall be had to *urf*."

[27] This brings me to the authorities cited by learned counsel for the respondent. He first relied on page 474 (Vol. II) of *Inayatul Hidayah*. This is a commentary of the famous work *Hidaya* and was written by Akmalud Din Muhammad, son of Muhammad, son of Mahmud al Babarti. He is the author of a large number of books on Jurisprudence and philology. He was born in Babarta—a town near Baghdad in A. H. 710. He was appointed a professor in the monastery of Shaikhuniyah in Egypt where he permanently settled. He died in A. H. 780. It contains the following passage. Translated, it reads as follows : [Quotation from original source omitted—Ed.]

"If they stated that is the *mehr*, but did not state whether it was *Muajjal* or *Moajjal* i. e. prompt or deferred then what would be decided, I say it is payable at once."

[28] A commentary of *Inayatul Hidaya* was written by Saadullah, son of Isa, son of Amir Khan-al-Mutri, commonly known as Saddi Chalapi. He was born at Qustamu (Syria) and was educated in Constantinople. He gained great reputation there as a Muslim teacher in Adarna (Turkey). He died in A. H. 945. Commenting on the passage in *Inayah*, Chalapi states at page 474 of his commentary, printed on the margin of *Fathul Qadir* (Vol 11) (Amiriyah, Bulaq, 1315, A. H. edition) as follows:—[Quotation from original source omitted—Ed.]

"I say to sum up that a man married a woman on some dower. The woman denies her person till her dower was paid completely, she is not justified to do this i. e. to deny her person, according to our *urf*, as part of it is prompt and part of it deferred, according to our *urf*, and *urf* is like a condition. . . . And it is stated in *Isbijabi* that if *mehr* is *Moajjal* i. e. prompt, or if it is not specified whether it is prompt or deferred then it would be payable at once, for *nikah* is a contract with consideration, and his (husband's) right has been established in his wife, therefore it is necessary that her right should also be established to the payment of her dower.

Conclusion: I say the answer in *Inayah* is according to *Isbijabi* and is opposed to all other books."

[29] It might be added here that Ahmad, son of Mansur Abu Nasr al Isbijabi was a person of great repute in Samargand. He was made a Mufti as stated by Abu Hafiz Umar, son of Muhammad an-Nasafi in the history of Samargand. Isbijabi died in A. H. 480.

[30] The second work relied upon on behalf of the plaintiff was the commentary on *Tanwir-ul-Absar* known as *Durr-ul-Mukhtar*. It was written by Muhammad bin Ali bin Muhammad bin Ali bin Zainul Abedin. He was commonly called Alaaddin-ul-Haskafi and was known as Mufti of Damascus. He had studied under thirty Shekhs as stated in *Khulasat-ul-Asar* when he visited Jerusalem and Madina, the most notable of

whom were Muhammad Khalil of Damascus and Saifud Din al-Quahshashi. He is said to have won high distinctions as a Kazi, Imam and Professor in several institutions of Damascus. He died at Damascus in A. H. 1088.

[31] It contains the following passage at p. 389:— [Quotation from original source omitted—Ed.]

"If the time for payment of dower is absurd and not clearly specified, it becomes payable promptly (*Ghayat-ul-Bayan*)."

[32] Learned counsel for the respondent also relied on the following passage at page 399 from *Rudd-ul-Mukhtar*: [Quotation from original source omitted—Ed.]

"And if it is altogether vague, viz. on being prosperous or on the advent of storm or rain—then because it does not specify time the dower becomes payable promptly as is stated in *Ghayat-ul-Bayan*."

[33] The first passage from *Durr-ul-Mukhtar* cited on behalf of the respondent is incomplete. If the whole of it is taken into consideration, it does not lay down any rule different from what was stated in *Tanwir-ul-Absar* or *Radd-ul-Mukhtar* which have already been referred to. Learned counsel's attention was not drawn to the word —(but). Had he noticed this and got the earlier portion translated, he would not have placed any reliance on this authority. The whole of the passage at pages 388-389 reads as follows: [Quotation from original source omitted—Ed.]

Translation: "A wife can refuse to submit to sexual intercourse and to the stimulants thereof—*Sharh-ir Majmah*—and (she can refuse) to travel with her husband even after (a previous) sexual enjoyment or retirement to which she had consented because all connubial intercourse is contracted with her (on payment of dower) and if sexual enjoyment is allowed on a certain occasion, it does not follow that wife should surrender herself on subsequent occasions as well—in order to realise the portion of the dower which was mentioned as prompt or in order to recover such portion thereof as is commonly held as prompt in case of her equals—the decision accords with it—because a thing which is in *common usage or custom* is considered as being stipulated for—provided the whole of it had not been deferred, or made prompt, in which case the agreement will be acted, because a thing which is patent should be given preference over an inference. But if the time fixed for payment of dower is grossly vague, then the dower becomes due at once — *Chayat-ul-Bayan*". The second passage from *Radd-ul-Mukhtar* is irrelevant as it merely refers to absurd conditions or contingencies like prosperity or the advent of storm or rain."

[34] The third and the last work which was cited by learned counsel for the respondent was *Hammadiyah*. This is a work on Muslim Jurisprudence of great authority and is recognised to be so in India. It was composed by Abul Fateh Rukh son of Hisamuddin-al-Mufti-an-Nagor under the direction of Qazi Hammadud Din Ahmad, son of Qazi Al Akram—the Chief Justice of Gujrat, Kathiawar—India). The works of reference do not provide us with any account of the author; but the fact that he quotes authorities dating from the 4th century A. H. down to

the first half of the 8th century A. H. and that no authority of the 9th century A. H. is quoted, indicates that the author flourished either at the end of the 8th or the beginning of the 9th century A. H. The author of Khizanatur Riwayat, who died in A. H. 920, quotes the present work. It contains the following passage. [Quotation from original source omitted—Ed.].

Translation.—"The dower is not free then from one condition and other. It would either be with a condition of its being deferred (Mowajjal) or it may be silent. But if it is with a condition of immediate payment or is silent, would become immediately payable (Moajjal) for it is a contract with consideration and is therefore required to be equal on both the sides. As the woman (wife) has established the husband's right, it is essential that he (husband) may establish hers and this would be established on payment."

[35] I have cited most of, if not all, the leading authorities on which either reliance was placed on behalf of the parties or came to my

notice in the course of my investigation mainly because under S. 2, Muslim Personal Law (Shariat) Application Act, (Act 26 [XXVI] of 1937) the rule of decision has been in all cases relating *inter alia* to dower directed to be, where the parties are Muslims, the Muslim Personal Law (Shariat). And since according to Hanafis, which the parties are presumed to be, the view of the majority of the Muslim Jurists is, as observed before, to prevail unless in the absence of consensus of opinion amongst the companions of the Prophet it is found to be altered or repealed by *ijma* of a subsequent age, it seems to be necessary to summarise the views held by the various Muslim Jurists on the question which now awaits to be determined in every century after Hijra regarding it to be a unit for the sake of convenience. This can be ascertained at a glance from the following table :

No.	Name of book.	Century.	Opinion when the contract is silent as to its being prompt or deferred.
1.	Isbijabi	5th century Hijra.	Prompt.
2.	Qazi Khan.	6th "	According to <i>urf</i> or custom.
3.	Mukhtasarul Waqayah.	8th "	" "
4.	Sharhul Waqayah.		" "
5.	Inayah.		" "
6.	Hammadiyah.	8th or 9th century.	Prompt.
7.	Fatawa Bazzaziyah.		According to <i>urf</i> or custom.
8.	Chalapi.	10th "	" "
9.	Ashbah Wan Nazair.		" "
10.	Bahr-ur-Raiq.		" "
11.	Sharhun Nuqayah.	11th century.	" "
12.	Tanwir-ul-Absar.		" "
13.	Durr-ul-Mukhtar.		" "
14.	Hamawi.	" "	" "
15.	Fatawa Alamgiri.	11th (end), 12th (beginning).	" "
16.	Radd-ul-Muhtar.	13th century.	" "

[36] It would thus be seen that the earliest authority in point of time but the original of which I could not lay my hands on is Isbijabi. It was, however, referred to by the author of Inayat-ul-Hidayah and its commentator Chalapi. According to Isbijabi the whole of the dower was to be prompt regardless of the fact whether it was expressly stated to be so or whether it was silent as to the time when it was to be payable as long as it was not expressly stated to be deferred. In other words, there was no difference in his opinion between a dower which was agreed upon between the parties to be payable promptly on demand and a dower which was left by them to be unspecified without any reference to the custom of the locality where the contract of marriage had taken place or of what the parties had understood their liability or rights under the contract to be. This view could only be defended firstly as the amounts of dower shortly after the prophet's time could not have been large when the minimum dower amongst the

Hanafia was only 10 *dirhems* (a silver coin of 2.97 grams) and Mehr-us-Sunnat itself (i. e. the *mehr* that the prophet himself gave to his wives) was 500 *dirhems* and secondly as the parties who were in those days anxious to discharge their debts [Quotation-Ed.] (*mehr* being one of them) and did not rest content until they were paid without even a demand. With the passage of time and with the growth of wealth, however, greater emphasis began to be laid by women on the sense of prestige and pride and their importance came to be considered by the amount of dower they were able to secure or was agreed to be paid to them at the time of their marriages. And as the amounts were frequently fixed far in excess of the husband's means partly to satisfy false notions of a women's dignity and partly to prevent a divorce, the parties began to enter into alliances under which the dower was either expressly deferred without any stipulation of time as to its payment or no time for its payment was fixed when either of the spouses was

afraid that the condition as to its being deferred or prompt might not be acceptable to the other. It could only have been at that time when the question which we have been called upon to answer assumed a greater importance. That is why I take it that no mention of this question is to be found earlier than the fourth century Hijra. Anyhow, the fact remains that no Jurist ventured to lay down the rule that the whole dower was to be taken as promptly payable when the time for its payment had not been fixed except in the 5th and the 6th century Hijra. And in the 8th century, the author of *Mukhtasar-ul-Waqayah* expressed a different opinion while Qazi Khan differed from Isbijabi in the 6th century. From the 9th century onwards, the rule appears to have been laid down uniformly that *urf* or custom of a locality has to be looked at in deciding the question whether the whole or any portion of *mehr* was to be prompt. That this was considered to be the rule prevailing in India at the time of Emperor Aurangzeb who was a great religious scholar himself and who must have taken care to select the large band of eminent scholars to compile the *Fatawa* cannot be lost sight of. The *ijma* of the Muslim Jurists during the last five centuries is thus clearly in favour of the view that *urf* or custom is to be a determining factor in deciding the amount of the dower which is in the absence of a specific agreement to be payable promptly on the wife's demand.

[37] But as the rule of law as to dower was determined in cases arising in British India even before the introduction of Muslim Personal Law (Shariat) Application Act on the personal law of the parties I must consider the cases in which the point was decided. Before dealing with those decided in India, I would take up the decision of their Lordships of the Judicial Committee in 19 W. R. 315,³ on which great reliance had been placed by the Madras Court and naturally by learned counsel for the respondent. I might add here by way of caution that the headnote is more generally expressed than can be borne out by the actual decisions of their Lordships.

[38] The suit in 19 W. R. 315³ was brought by the appellant in the Court of the Civil Judge at Lucknow to recover from his father a sum of Rs. 50,000 as her share of the dower alleged to have been settled on his mother, the late Oomrao Begum. Various pleas were raised on behalf of the father in his defence but we are not concerned with them. The objections raised on behalf of the defendant had not prevailed before the Civil Judge but on appeal the defendant's contentions prevailed and the suit was dismissed. Mirza Bedar Bukht, the plaintiff in that case, then preferred an appeal to Her Majesty in Council. The

reasons given by the Judicial Commissioner were not found to be acceptable by their Lordships of the Privy Council. In supporting the judgment, however, a fresh point was raised by Mr. Bell on behalf of the respondent. He contended that "by the general Mahomedan law, and at all events by the law of Oudh, as modified by the Punjab Code, the dower was not payable except upon the dissolution of the marriage by divorce, or upon the death of the husband." In other words, the contention was that the dower was deferred and would be payable not after Oomrao Begum's death but after the death of her husband, the plaintiff's father. The contention in regard to the law of Oudh "as modified by the Punjab Code" was repelled. Their Lordships then proceeded to consider Mr. Bell's proposition that the dower was not in that case recoverable before the defendant's death in accordance with the general Mahomedan law. It must be stated here that the parties in that case belonged to the royal house of Oudh and were, therefore, Shias. After disposing of the point that the contention could not be maintained if the dower was expressly prompt and therefore "exigible by the wife during the coverture" proceeded to observe as follows :

"The difficulty is to say what is the rule in the absence of express stipulation, as where the dower is merely described as '*mowujjil*' or deferred."

Their Lordships were thus considering the question as to what would be the meaning of the word 'deferred' if dower was merely described as such. Would it be recoverable on the divorce or on the wife's death or would it not be recoverable before the husband's death? In this connection, reference was made to case XXX of Macnaghten's Precedents at page 280 which seems to show that questions of this kind were to be determined by local usage. The question and the answer which were referred to by their Lordships of the Privy Council were as follows :

"Q. A husband executes a deed of dower in favour of his wife, settling upon her ten thousand gold mohurs and fifty thousand rupees; and specifying that the payment of a part should be prompt, and that the payment of the remainder should be deferred. The amount payable promptly is not defined. Under these circumstances, according to law and the usage of the country, how much of the stipulated dower should be paid promptly, and how much deferred until after the death of the husband?

"A. As the deed stipulates a specified amount of dower, there is not such a degree of uncertainty as entirely to invalidate the claim; but it is stated that a part is to be paid promptly, which leaves the amount of the remainder, to be paid at a deferred period, uncertain. According to law, in such a state of uncertainty, recourse must be had to local usage. This marriage appears to have been contracted at Moorshebadad. The practice therefore which obtains with respect to deeds of dower at that and the adjacent places, should be followed. In general it is stipulated that the payment of one-third shall be made promptly, and that

of the other two-thirds deferred; and it is also usual to stipulate that the payment of one-half shall be prompt and of the other half deferred. The adoption of the former practice, therefore, is in this instance, allowable; but the adoption of the latter is in all instances more certainly equitable."

The author had added the following note to the above answer :

"The above rule, however, was by no means laid down as a principle to be adopted on all similar occasions. The usage of the country is the only legal rule to be observed in controversies of this description. Had there been no mention whatever whether the dower should be prompt or deferred, the whole must be considered to be promptly due: —*See Prin. Marriage. &c., 22.* This is unquestionably the law and the author of the *Shurhi Waqaya* admits it to be so, although he states that occasionally, in modern practice, respect is paid to the peculiar usages of the place in which the cause of action may have originated."

I have, however, been unable to find any admission of the kind referred to by Macnaghten in *Sharah-ul-Waqaya*. On the contrary, I have already quoted the opinion of the author of *Sharah-ul-Waqaya* elsewhere in this judgment.

[39] In considering Mr. Bell's contention their Lordships did not regard the observations by Baillie in his *Digest of Mahomedan Law* at p. 92 to be of any great use as he had broadly stated "that deferred dower is not exigible till the dissolution of the marriage." If a Muslim marriage stands dissolved by the death of either of the spouses, Baillie's statement appears to me to have been a complete answer to the contention advanced by Mr. Bell but was not apparently so regarded by their Lordships of the Privy Council. After considering two cases in 1 S. D. A. Rep. 276⁵ and 1 S. D. A. Rep. 48,⁶ their Lordships were of the view that the observations in the first case were not precise upon the point and the second case did not involve an adjudication upon the question whether the deferred dower could be recovered from the husband in his lifetime; since, although the wife had predeceased her husband, the suit was not instituted by her heirs until after his death, and was brought against his heirs. But their Lordships did not in the end think it necessary to decide

"whether deferred dower, whenever no time for its payment is expressly limited by contract, must be presumed to be payable on the dissolution of the marriage by the death of either husband or wife; or whether it becomes demandable only on the death of the husband"

as their Lordships arrived at the conclusion that the dower was prompt upon the true construction of the contract in that case. Then appears the relevant observation by their Lordships of the Privy Council on which reliance was placed by the Madras Court. The observation is as follows :

"The admitted rule *seems to be* that laid down in Macnaghten's Principles, Chap. 7, Art. 22, to the effect that 'when it may not have been expressed whether the

payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand."

They proceeded to add however :

"And this seems to have been the view taken of the contract in the Courts below."

In doing so they dissented from Sir George Couper's decision that the dower presumably (deferred dower) could only be claimed on the divorce of the wife or death of the husband.

[40] It would, therefore, be seen that the only objection taken by Mr. Bell was that the suit was premature as the husband had not died and deferred dower was not recoverable in the absence of an express divorce until the death not only of the wife but of the husband as well. The contract which was construed by their Lordships is not before us and it was on the true construction of that contract that their Lordships had held the dower to be prompt. This was a finding of fact and has no relevancy where the contract is expressed in words different from those which their Lordships had construed. It is true that in supporting the conclusion as to the construction they had added an observation on which reliance was placed by the Madras High Court, but that appears to be an argument given by their Lordships in support of the interpretation which they were placing upon the contract. Moreover, they had not held the admitted rule to be as stated in Macnaghten's Principles but in the absence of any discussion on this point, as is clear from the fact that no authorities to the contrary were referred to by them, their Lordships had simply observed what the admitted rule *seemed to them to be*. Since "every judgment" according to the observations of their Lordships of the Privy Council at p. 234 in A.I.R. 1940 P. C. 230⁷ based on the remarks made by Lord Halsbury in 1901 A. C. 495⁸

"must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found",

the relevant observation in 19 W. R. 315³ cannot be, although entitled to great respect, found to be conclusive for the same care and attention could not have been paid to the expression of an opinion on a point which did not arise in the case and on which all the relevant authorities were not cited or considered. Macnaghten's was undoubtedly one of the oldest books on Mahomedan Law in English but it is not to be overlooked that it was written as the author had himself observed at page (iii) of the Preliminary Remarks that

"the compilation was entirely and exclusively his own and that it consequently possessed no official weight whatever, and no authority beyond that which might be ascribed to it by individual confidence."

The book was after all written with the object of helping the judicial service in the administration of Mahomedan law and the accuracy of the doctrines contained therein has to be, when questioned, examined in the light of the authorities on some of which it might have been based. Moreover, it is quite possible that Macnaghten was desirous of placing before his readers a consolidated statement on various points of both the Sunni and Shia law which could be as far as possible stated by him in one place for I find that he devoted a separate chapter to the Shia law of inheritance which could not have been so expressed and does not appear to have signified that he was dealing with Sunni or Shia systems of law in other chapters. It is well known that according to Shia law the whole of the dower is to be in the absence of an express contract to the contrary regarded as prompt, and it is quite possible, therefore, that in his anxiety to reconcile the two systems of law, he chose to select such opinion on the Sunni law as tallied with the Shia law and stated the law on the point now under consideration on the basis of authorities which although fewer in number could not be ruled out as being devoid of any weight.

[41] I propose now to take up the three Madras decisions which have taken the view that the dower is to be regarded as prompt when the contract is silent as to the time of its payment. The first case is in 6 Mad. H. C. R. 9.⁹ The parties in that case were Shafis and not Hanafis. It is also noticeable that the dower in that case was Rs. 20 only but it was presumed to be prompt or payable on demand as no conditions had been entered into as to the plaintiff's dowry (dower) being payable either at the time of divorcing her or at the defendant's death. The principal Sadr Amin had, in upholding the Munsif's decision on the question now in issue, observed as follows :

"The witnesses that gave their evidence in favour of the defendant in the above respect deposed that the dowry is given among the parties of the suit who are of Saffa Majah class either at the time when husband and wife join together, or after the death (of the husband)."

It would thus seem that there was evidence in that case that according to the practice prevailing among the Shafis in Mangalore the dower was, if not stated to be either 'Moajjal' (exigible) or 'mowujjal' (deferred), regarded to be prompt. This judgment was upheld by the learned Judges of the Madras High Court who in a very short judgment disposed of the case with the observation that they further agreed that it was a presumption of Mahomedan law that in the absence of express contract dower was presumed to be prompt. Leaving aside the practice or custom prevailing in Mangalore or Madras

with which we are not at present concerned, this case in the absence of any reference to the authorities or of any reason for the opinion expressed therein could not be treated as an authority for the general proposition that the practice or usage prevailing in a "locality" has not to be considered and a decision can be given regardless of the same. Indeed, as I have pointed out evidence had been had in that case on the point as to what the custom or usage was in regard to such dowers, and the finding of the Principal Sadr Amin was based on that evidence.

[42] The second Madras case is that in 23 Mad. 371.¹⁰ In referring this case to Full Bench, however, Sir Charles Arnold White C. J. and Moore J., did not refer to the fact that the finding in 6 Mad. H. C. R. 9⁹ was based on the evidence which had been led in that case but assumed that the parties had agreed with the presumption of Mahomedan law to the effect that in the absence of any agreement one way or the other the presumption was that the dower was prompt. The learned Judges had referred to Baillie, Ameer Ali and Wilson as well as to the Privy Council decision in 19 W. R. 816³ and after expressing the opinion that the balance of authority appeared to them to be in favour of the principle adopted by the Bombay and Allahabad High Courts decided to refer the matter to a Full Bench as they could not themselves overrule the prior decision of the Division Bench in 6 Mad. H. C. R. 9.⁹

[43] The learned Judges of the Full Bench, however, took the view that in the absence of an express contract that dower was exigible or deferred it must be held to be payable on demand. They give four reasons for that opinion:

(1) The rule has been quoted with approval by the Privy Council in 19 W. R. 815.³

(2) That the dower was consideration for the marriage and therefore payable on demand unless its payment had been wholly or partially postponed in express words. They found this rule to be more consonant with reason than the rule held to prevail in some other Presidencies where the proportion in which such dower is to be considered prompt or deferred was left uncertain.

(3) That the parties in that case had taken this view of the contract themselves as the defendant had not pleaded that any part of the dower claimed was deferred but had pleaded payment of the same in full, showing his consciousness that it ought to have been so paid either according to custom or according to law.

(4) That it was inadvisable to alter the law after this lapse of time in favour of an inexact rule which was regarded to be unworkable in practice."

[44] I have already dealt with the decision of their Lordships of the Privy Council and it is unnecessary to repeat the reasons which have led me to conclude that it did not contain their final approval on the point. Nor is it correct to say that dower was consideration for the marriage. I have already discussed that question

earlier in this judgment. Dower not being a consideration for marriage, the same considerations could not apply which might have applied to the case of the purchase of a commodity or article in which price had not been paid although the property had passed to the purchaser. Nor can I find any reason why the learned Judges should have been attracted to that view on the ground of convenience or certainty. If the rule as to the extent of presumption to be drawn in favour of any portion of the dower which is silent and unspecified is stated with clarity, it would have the same merit as the rule stated by them in the Full Bench. As to the third reason the actual decision in that case may be supported on the ground that the defendant had not in that case pleaded the whole or a portion of the dower to be deferred and the Court was inclined to infer an admission by the defendant from the pleadings that the whole of the dower was admitted to be exigible. No exception can be taken to the last reason given by the learned Judges. If a particular view had been found to prevail in the Madras Presidency since 1870 i. e., for a period of about thirty years, the learned Judges were fully justified in coming to the same decision on the basis of *stare decisis*. It is quite likely that the custom in the Presidency might have independently of and prior to the decision in 6 Mad. H. C. R. 9⁹ and in any case subsequent to that decision, been that the whole of the dower was to be regarded as prompt if silent as to the time of its payment. And if so, the rule of law laid down by the learned Judges of the Full Bench is in no way different from what I am now inclined to deduce from the various original authorities.

[45] The last Madras case I. L. R. (1938) Mad. 609⁴ was decided by a Division Bench which was, as stated at p. 618, bound to follow the Full Bench decision in 23 Mad. 371.¹⁰ It is true that some other reasons were also given to come to that decision but they have already been discussed in detail in this judgment. The following observations towards the end of that judgment will however show that the custom prevailing in Madras was intended to be followed and it was considered inadvisable to do anything that would affect the rights which the parties had understood to have already come into existence. The passage reads as follows :

"At all events it would be dangerous to go back upon or overrule decisions which are not manifestly erroneous. They have stood the test of time and must be deemed to have influenced a majority of Muhammadans living in this Presidency at least into a belief that if the character of dower is not specified, it would be taken to be prompt."

[46] The largest number of cases decided by one Indian High Court and brought to our notice

were from Allahabad : see 1 ALL. 483,¹¹ 1 ALL. 506,¹² 33 ALL. 291,¹³ 41 ALL. 562,¹⁴ A. I. R. 1931 ALL. 403,¹⁵ A.I.R. 1934 ALL. 441,¹⁶ A.I.R. 1941 ALL. 181¹⁷ and A.I.R. 1943 ALL. 184.¹⁸ It has consistently been held in that Court that if the amounts of prompt or deferred dower have not been specified in a contract, their proportion will be regulated by custom and in the absence of any proof of custom, by the status of parties and by the amount of dower settled between them. Some of these have, however, taken the view that the whole of the dower, cannot be held to be deferred, although why it should have been so held, if the custom of a locality were found to be to that effect, does not appear to be clear. Some of these have, however, in the absence of any proof of custom held one-third of the amount of dower agreed upon to be prompt while the others have either increased that amount to one half or reduced the amount to one fifth in accordance with what appeared to the learned Judges to be reasonable according to the circumstances of each case. In most of these cases the decision arrived at by the trial Courts was not interfered with as it was not found to be wrong. For want of any definite principle, the proportions have fluctuated in each case more or less arbitrarily by what I regard to be a rule of thumb. This state of affairs does not seem to me to be satisfactory although I must admit that in the absence of proof of any definite custom, a certain amount of discretion must necessarily be exercised by the Courts in determining the amount of prompt dower. But what presumption has to be raised if the parties fail to lead any or satisfactory evidence as to the custom prevailing either in the wife's family (and I refer to the wife's family deliberately) or in the locality where the contract was entered into when it is found to be silent as to the time of its payment and within what ambit has that discretion by the Courts to be limited are points which arise for our serious consideration and must be finally settled so far at least as the Courts of this Province are concerned.

[47] Two Bombay cases were cited before us on behalf of the parties. Relying on the view taken by the Sadar Diwani Adalat at Agra in 3 S.D.A.N.W.P. 185¹⁹ three learned Judges of the Bombay Court held it in 2 Bom. H. C. R. 307²⁰ equitable to hold that where no specific amount of dower had been declared exigible, one third of the whole should be considered exigible and the remaining two thirds claimable on the husband's death. But no reason was given as to why one-third should have been regarded to be equitable. Nor was anything said to show why the balance should be held to be recoverable on husband's death only and not on dissolution of marriage

either by divorce or as a result of the death of one of the spouses, wife or husband. This decision was based on Baillie's Mahomedan Law which was specifically referred to in the judgment. The other decision by a Division Bench of that Court was in 35 Bom. 386.²¹ The whole of the dower was held to be exigible but it was so held on the facts of that case. The dower was fixed at Rs. 750 only out of which the wife had received Rs. 157 in the shape of ornaments. Although there are references to both Macnaghten and Baillie in the counsel's arguments, neither of them was referred to by Chandavarkar J. who distinguished the decision in 3 S.D.A.N.W.P. 185¹⁹ on the ground that it "lays down no inelastic principle of law, but merely points out what, in the circumstances of the case, was an equitable rule to follow."

[48] No Calcutta decision was brought to our notice but learned counsel for the appellant has drawn our attention to the view taken by the Patna Court in 8 Pat. 645²² according to which custom was to regulate the amount of exigible dower when the contract was silent as to the time of its payment, and the status of parties as well as the amount of dower settled by the husband were to be according to the learned Judges borne in mind when fixing the proportion referable to either category. It may be pointed out that the case was remanded for the purpose of ascertaining those matters although the learned Judges had agreed with the trial Court that the plaintiff who had asserted the whole of the dower to be prompt had failed to establish her allegation.

[49] The first Punjab case was that in 109 P. R. 1880.²³ The dower in this case was found to have been fixed at Rs. 300 out of which Rs. 100 had been relinquished and the plaintiff was granted a decree of one-third of the balance of Rs. 200 on the ground that it might be 'accepted as a fair proportion.' In coming to that decision reference was made to the earlier Bombay decision in 2 Bom. H. C. R. 291²⁰ to the view taken by the Old Sadr Diwani Adalat of N. W. Provinces Rep. N. W. P. iii, 185¹⁹ and to the two decisions reported in the first volume of Allahabad Law Reports. As the wife in 1 ALL. 483¹¹ was found to be a prostitute, one fifth of the dower allowed as being a fair proportion was not held to furnish a good criterion for fixing that proportion. But as "the wife was apparently of a respectable family" in 1 ALL. 506¹² the one-third fixed in that case as being the proportion of the prompt dower was regarded to be "very much in point." No reasons were given by the learned Judges of the Punjab Chief Court to fix the one-third proportion as prompt dower although they were inclined to accept Baillie's view "that a fair proportion must

be considered as prompt with reference to the woman and dower and also as to what is customary" in preference to that of Macnaghten. In the absence of any proof of custom in Amritsar, which should have been ordered to be proved, this case cannot be treated as laying down any general rule about the custom of the locality in which the contract of marriage had been entered.

[50] The decision in 5 P. R. 1891²⁴ followed the same lines and preferred the views expressed by Baillie and Fatawa Alamgiri to those of Macnaghten. In maintaining the decree to the extent of one-third of the dower passed by the lower Court, Plowden J. observed as follows:

"The parties to this suit being of the Sunni sect, I am not prepared to say, on the facts and the authorities that the lower Courts have erred in determining that a sum amounting to one-third of the dower of Rs. 4,000 may properly be deemed prompt."

[51] It remains to be observed that the learned Judges fixed the proportion of the prompt dower not on the considerations mentioned in Baillie but in accordance with a rule which they were prepared to deduce from the Bombay and Allahabad decisions "ordinarily fixing the prompt dower in such case at a third part of the whole." With great deference I cannot see how the custom prevailing in parts of Bombay Presidency and United Provinces could be applied to the Punjab either generally or to any portions of it without evidence as to what was customary and without considering the status of the wife or the amount of dower agreed to be paid to her.

[52] The decision in 1 Lah. 597²⁵ is not quite relevant as the suit was one for restitution of conjugal rights and in passing a decree contingent on the payment of a portion of dower the matter was regarded and in fact considered to be discretionary with the trial Court which discretion was not found to have been improperly exercised.

[53] A reference in the end was made to an unreported decision by a Division Bench of this Court in R. F. A. No. 38 of 1941.³ This supports the appellant and after discussing the authorities to which reference was made in that case and others which had not been referred to I have come to the same conclusion. But the question as to the proportion of dower was disposed of very briefly in the following words:

"In the present instance, some questions were asked in the course of the evidence on the question of custom but there is no very clear evidence on the point, and I think that in the circumstances the trial Court was correct in allowing one-third of the dower as prompt."

[54] Amongst the text-book writers in English I have already dealt with Macnaghten. Baillie's Digest of Mohammedan Law was "founded chiefly" on the Fatawa Alamgiri in regard to which he stated in his preface that it was "a pity that it was not adopted by the British Government as the standard authority for its Courts of justice."

It is not surprising therefore that he expressed his opinion at p. 126 that

"both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman and so much is to be *mooujbul* or prompt, accordingly, without any reference to the proportion of a fourth or fifth but what is customary must also be taken into consideration."

The same words were quoted by Shama Churun Sircar in his Tagore Law Lectures at p. 359. Sir Abdur Rahim expressed the same view at p. 535 of his Muhammadan Jurisprudence where he stated that "in the absence of any contract the parts of dower which would be exigible and deferred would depend" on the custom of the country. Sir Rowland Wilson, although adverting to the conflict as to the presumption to be made where the marriage contract was silent on the point as to what portion of the dower was to be prompt and what deferred expressed the view at p. 120, (Edn. 6) in his Anglo Mohammedan Law that

"the balance of recent authority at Allahabad and Bombay being in favour of fixing the proportion with reference to such circumstances as the position of the wife, the custom of the locality and the amount of the dower settled."

Tyabji in his book on Muhammadan Law started with the statement at p. 200, (para. 117, Edn. 3) that

"in the absence of any agreement or custom to the contrary, the whole of the mahr will be presumed to be prompt."

But this was stated on the basis of Madras decisions, the later Bombay case in 35 Bom. 386²¹ and the Privy Council's opinion in 19 W. R. 315.³ He added in sub-cl. (2) of the same paragraph however that

"in places and amongst classes of people where there is a custom that part only of the mahr is promptly payable and the rest is deferred, such a portion only will be considered to be promptly payable, as in the case of woman in similar circumstances, and with similar mahrs is customarily made promptly."

As to the presumption to be raised in cases of unspecified dowers he added in sub-cl. (2) that "it is presumed in India except in Madras that by general custom part only of the mahr is promptly payable." In the absence of evidence of custom relating to woman in similar circumstances, and with similar mahrs, the Court in its discretion fixes what portion should be held to be prompt. He attempted to reconcile the views expressed by Baillie and Macnaghten at p. 201 by stating that "the question really is what the parties contracted and intended. Consequently any custom or usage prevalent amongst the people must be given effect to, on the ground that such usages represent terms so usual and well-known that they need not be and are not expressly entered in the document but impliedly form part of the agreement."

[55] Lastly reference must be made to Syed Ameer Ali's well known works on Muhammadan Law where he characterised Macnaghten's statement to the effect that the whole of the dower must in the absence of any specification be regarded to be prompt as incorrect (p. 448 note in vol. 2, 1929) and basing his opinion on the various original authorities expressed the view on the preceding page that

"if there is no specification of how much is prompt and how much deferred, recourse must be had to the custom of the locality to determine the question."

[56] I have referred to every text book to which reference was made by learned counsel for the parties. A reference is made in one of the Madras cases to Gopala Charlu's text of Muhammadan Law as being of the same view as that of Macnaghten but I have not been able to procure that book as it was not available in the library.

[57] Having regard to the opinions of the late Jurists (Quotation from original source omitted —Ed.) in the last five centuries I must hold on the principle of *ijma* that recourse must be had to the custom (of the wife's family or of the locality) (*urf*) to determine the question as to how much of a dower is prompt and how much deferred if the contract happens to be silent in regard to the time when it was payable and that on the failure of proof of custom the status of the woman and the amount of dower fixed between the parties are, while fixing the proportion, to be taken into consideration. The majority of the modern text-book writers are also of the same view which has been accepted by a majority of Indian Courts.

[58] I should, however, like to add that I have not been able to discover any warrant for the proposition that the whole of dower cannot be by custom found to be deferred and a portion must be regardless of custom necessarily held to be prompt. If a contract has to be construed with reference to custom or in other words if custom has to be imported as an implied term of the contract into which the parties had entered it has to be given effect to on the principle that although not expressly stated they had understood such a term to have been annexed to the contract. As observed by Baron Parker in (1836) 1 M. & W. 426²⁶ "evidence of custom and usage is admissible to annex incidents to written (*and more so to verbal*-these words are mine) contracts in matters with respect to which they are silent." "This has been done" in His Lordship's words "on the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. If a contract has, therefore, to be constru-

ed with reference to a usage or custom, there is nothing which could prevent the whole of the dower to be either prompt or deferred in accordance with the custom.

[59] As to why I have, when referring to the custom, used the words "of the wife's family or of the locality" it must be stated that I had the principle of Mehr-ul-misl (Quotation from original source omitted—Ed.) in mind which is to be payable to a woman when the amount of dower is not agreed or specified at the time of marriage or even when there is an agreement that no dower shall be fixed by the husband. In such cases the dower which is customarily fixed for the females of the wife's family, i. e. (for the bride's full or consanguine sisters or for the female descendants of her male agnatic ancestors) is regarded to be payable to the wife. This bears a close analogy with the present case and analogy is one of the well-recognised methods under the Muslim law. Although the amount of dower is found to have been specified at the time of marriage, the contract was silent in the present case as to the amount which was payable on the wife's demand (exigible). In the former case the contract was silent as to the amount of dower while in the latter it is silent as to the amount of how much was prompt and how much deferred. If the custom of the family was to be taken into consideration when no dower was fixed at the time of marriage there is no reason why the same custom should not be taken as a guiding factor in fixing the proportions of the prompt and deferred dower. I am, therefore of the view that the custom of the family should be taken into consideration on the same principle in the first instance and it is only when no evidence or no satisfactory evidence is available on that point that the custom of the locality may have to be considered. Failing either of these, the other matters referred to by the Muslim Jurists (*viz.*, the status of the woman and the amount of dower) have to be considered in fixing the proportions.

[60] The question then is as to what should be the rule if the custom alleged by the parties is not found to be proved? This is important to decide for what is to happen if a wife in her suit for dower fails to establish her allegation that whole of the dower, if such be her case, was prompt according to custom and the defendant has similarly failed to prove that the whole of the dower was, if such be his case, deferred according to custom? Is the whole of the suit to be dismissed in the first alternative mentioned in the preceding sentence or is the suit to be decreed in its entirety if the situation envisaged in the second alternative comes to pass? It was argued on behalf of the defendant that the plaintiff's suit must fail altogether as she had come to Court

and the onus of substantiating her allegations lay on her. The question really is whether any presumption should be raised by the Court and if so, what should it be? Moreover is the issue in regard to custom to be framed by the Court suo motu in every case for dower unspecified to be prompt or deferred at the time when the contract was entered into?

[61] The second question in the preceding paragraph is in my opinion easy to answer. Issues are to be framed on the pleadings of the parties, and if they have failed to allege any custom, the Court cannot be expected to frame an issue. How can the Court call upon the parties to prove any custom which they have not themselves alleged? Is the Court also to call evidence if the parties do not choose to adduce any? I am, therefore, clearly of the view that in the absence of any plea in regard to a custom or usage, the Court cannot raise any issue suo motu or record any evidence. The parties must be left to formulate their pleading in any manner that they are advised and the Court can only frame such issues as arise from the pleadings raised by the parties.

[62] The question as to the presumption to be raised in regard to any portion of the dower to be prompt or deferred when the contract is silent in regard to the same bristles with difficulties. Is the minimum dower permissible under the Muslim law to be regarded as prompt and the rest deferred? But what if the minimum dower of ten dirhems alone is fixed? Should the whole of it then be considered to be prompt? If so, why? There are some cases in which the prompt portion has been taken to be one third while there are others in which it was regarded to be either more or less. The Punjab cases or even those decided by the Allahabad Court are, generally speaking, of not much assistance as in none of them any particular custom was found to have been existing by which the prompt portion of the dower was fixed. Moreover, how can the customs prevailing in Amritsar (109 P. R. 1880²³ being that of Amritsar) or even in Delhi, (5 P. R. 1891,²⁴ being from Delhi)—even if they were found to have been established which they were not—be regarded to apply say to Peshawar and Multan? The Fatma Alamgiri contains a statement that "if half of the dower be prompt and the other half be deferred, as is customary in our cities." If that was the custom prevailing in the cities at the time of the Emperor Aurangzeb, would it be wrong in the absence of any proof to the contrary to raise a presumption in regard to dowers about which there is no stipulation as to any specific part being prompt or deferred that one-half of what was agreed was prompt and the other moiety deferred? That is what Mr. Ameer

Ali so stated at p. 442 to be customary in India. The rule seems to me to be equitable and may in my view be adopted. This is of course in a case where no custom or usage is found to exist either in the wife's family or in a locality or town. But when there is no proof of custom, it would be well in my judgment to start with the presumption that half of the amount agreed was deferred and half prompt. But this presumption may be rebutted and the portion of the dower enhanced or reduced with the status of the wife and the amount of dower fixed.

[63] I would for the above reasons answer the question referred to us for opinion that the custom or usage of the wife's family or of a locality is in the first instance to determine what portion of the unspecified dower is to be prompt and what deferred and in the absence of proof of any custom, a presumption may be raised that one-half of the amount stipulated was prompt and the other half deferred but this presumption can be rebutted by either party and the proportion may be increased or reduced in accordance with the circumstances of each individual case. In considering those circumstances the status of the wife and the amount of the dower must be taken into consideration. The case will now go back to the Division Bench for final disposal.

[64] **Abdul Rashid C. J.**— I agree.

[65] **Mahajan J.**— I agree that the question be answered as suggested by my brother, Sir **Abdur Rahman**.

[66] **Khosla J.**— I agree.

[67] **S. A. Rahman J.**— I agree.

R.G.D. *Answer accordingly.*

A. I. R. (35) 1948 Lahore 151 [C. N. 46.]

TEJA SINGH J.

Jagdev Khan — Petitioner v. Emperor.

Criminal Revn. No. 2198 of 1946, Decided on 10-12-1946, against order of Addl. Sessions Judge, Lahore, D/- 20-7-1946.

(a) Criminal P. C. (1898), S. 89—Burden of proof as required by section lies on accused.

Under S. 89 the onus to prove that the accused did not abscond for the purpose of avoiding execution of warrant and that he had no notice of the proclamation issued under S. 87 lies on the accused. [Para 2]

Annotation : ('46-Com.) Cr. P. C., S. 89 N. 1 Pt. 2.

(b) Criminal P. C. (1898), S. 87 — Proclamation directing accused to appear within thirty days from date of its issue is invalid and renders subsequent attachment under S. 88 invalid — Presumption under S. 87 (3) cannot be raised in such a case — Criminal P. C. (1898), Ss. 88 and 89.

A Court issued a proclamation under S. 87 directing the accused to appear before him within 30 days from to-day. A copy of the proclamation was not affixed to the Court house as required by S. 87. The only statement with regard to the publication of the proclamation made by the Court was that the reports regarding the proclamation and the warrant of attachment had been

received and that the proclamation had been issued without mentioning the date on which the publication was made. The accused applied under S. 89 for restoration of property:

Held, that the proclamation was invalid as the time fixed for appearance of the accused was less than 30 days from the date of its publication and therefore the subsequent attachment under S. 88 was also illegal, and the accused was entitled to the restoration of the property. [Paras 4 and 5]

Held also that no presumption under S. 87 (3) could be raised in such a case firstly because the order of the Court under S. 87 (3) did not mention the date on which proclamation was made and secondly because the proclamation itself was invalid: 6 A. I. R. 1919 Lah. 57 and 19 Mad. 3, *Rel. on.*

Annotation : ('46-Com.) Cr. P. C., S. 87 N. 4 Pt. 1; N. 6, Pt. 4.

Cases referred :—

1. ('19) 32 P. R. 1919 Cr. : 6 A. I. R. 1919 Lah. 57 : 54 I. C. 994 : 21 Cr. L. J. 210, *Emperor v. Multan Singh*.

2. ('96) 19 Mad. 3, *Queen Empress v. Subbarayar*.
M. L. Sethi — for Petitioner.

Kartar Singh Chawla A. E. R. — for the Crown.

Order.—This is a petition in revision against an order of the Additional Sessions Judge, Sheikhupura, confirming an order of the Additional District Magistrate, Sheikhupura, whereby the petitioner's application under S. 89, Criminal P. C., was dismissed. The facts briefly stated are as follows: The petitioner was prosecuted under S. 307, Penal Code. On 26-3-1945, after several attempts had been made to arrest him and on the receipt of the report that he was absconding the Magistrate in whose Court the case was pending, ordered proclamation to issue against the petitioner under S. 87, Criminal P. C., and also directed that his property be attached under S. 88. In accordance with this order, certain property was attached on 4-4-1945. The petitioner appeared on 8-3-1946, and applied to have the attachment vacated. His allegations were that he had gone to a far off place, because he had married a woman against the wishes of his brothers and since he was afraid that if his brother came to know of his whereabouts they would compel him to give up that woman, he was not in correspondence with them and consequently, he did not know anything about the case. Both the Courts below came to the conclusion that the petitioner had not been able to satisfy the requirements of S. 89 and the property could not be delivered to him.

[2] The petitioner's counsel first argued that his evidence had been wrongly disbelieved and if we read the statements of his witnesses along with the report appearing on the back of one of the processes issued against the petitioner it would be clear that the petitioner had eloped with a woman and he did not abscond or conceal himself with a view to avoid execution of the warrant issued against him. The perusal of his

evidence, however, makes me think that it contradicted the position taken up by him in his own petition and no reliance could be placed upon it even otherwise. The onus to show that he did not abscond, etc., and that he had no notice of the proclamation issued under S. 87 lay upon him and the Courts below were right in holding that he was not able to discharge it.

[3] It was then urged by the petitioner's counsel that the proclamation issued under S. 87 was invalid, since it offended against the mandatory provisions contained therein and consequently, the attachment made under S. 88 was illegal and void. The relevant words of sub-s. (1) of S. 87 are:

"If any Court has reason to believe.....that any person against whom a warrant has been issued by it has.....such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation."

Sub-section (2) lays down the methods in which the proclamation is to be published. They are:

(a) It shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides, (b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village, and (c) a copy thereof shall be affixed to some conspicuous part of the court-house."

According to the learned counsel there were two defects in the proclamation; (1) that the date specified therein for appearance of the accused was within 30 days of its publication and (2) that there was no affixation to a conspicuous part of the court house.

[4] As regards the first, my attention was drawn to the original proclamation (pp. 12, 13 of the Magistrate's record) the last words of which are:

"Proclamation is hereby made that the said Jagdev of Phandar is required to appear at Sheikhpura in this Court or before (...) to answer the said complaint within thirty days from to-day."

This was clearly in contravention of S. 87 and there was double error (1) that time was fixed from the date of the issue of the proclamation and not from the date of its publication and (2) that it was within thirty days and not less than thirty days as required by the section. The learned counsel for the Crown argued that in view of sub-s. (3) of S. 87 which provides that a statement in writing by the Court issuing a proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with and that the proclamation was published on such day, no notice should be taken of the defects pointed out by the petitioner's counsel. In this case the only statement that the Court made in writing regarding the publication of the notice

ton 11-4-1945, was that the reports had been received regarding the proclamation and the warrant of attachment and that the proclamation had been issued. No mention in that statement was made of the date of the publication. Consequently, I am of opinion, that no presumption under sub-s. (3) of S. 87 could be raised. I am supported in this view by a Division Bench decision of the Punjab Chief Court reported as 32 P. R. 1919 Cr.¹ wherein the learned Judges held that an order of the Court under S. 87 (3) of the Code which only states that the proclamation under the section has been duly published but not that it was published on a specified day is defective and cannot, under the circumstances, be considered conclusive evidence that the requirements of S. 87 have been complied with. Moreover, sub-s. (3) can only apply to a proclamation which is otherwise a legal proclamation and a proclamation, as the one in the present case, wherein the date for the appearance of the offender is fixed less than thirty days from the publication of the proclamation is altogether invalid. This view is also supported by the Punjab Record case mentioned above. In that case the requirements as to publication contained in S. 87 (2) (a) and (c) were not complied with and moreover, while the publication took place on 15th May the date fixed for the appearance of the petitioner was 11th June i. e., within thirty days of the date of publication. It was held that the publication was not in accordance with law and the subsequent proceedings were also invalid and must be set aside. Reference may also be made in this connection to 19 Mad. 3.² In that case a proclamation was issued in respect of an accused person who had absconded and it was affixed to the court-house on 6-11-1893, the date fixed for the appearance of the accused was 11-12-1893, and his property was attached. The proclamation was not published at the village where the accused resided until 15th November. The accused surrendered on 25-7-1894, and applied for restoration of the property under Criminal P. C., S. 89 and an order was made by which the restoration of his property was refused. It was held that there was no legal proclamation under S. 87, Criminal P. C. and that the order should be set aside and the attachment declared void.

[5] In the result, I allow the petition and declare that both the proclamation and the attachment issued subsequent to the proclamation were illegal and direct that the property attached be restored to the petitioner.

[6] Before concluding, I wish to point out that the errors in the proclamation were due to two reasons. One, which is more important than the other, is that the printed form used was the

old one which was substituted by another form by the amending Act of 1923 and the second is that it was very carelessly filled in. It also appears to me that the printed form is not even in accordance with the old form. The attention of the Subordinate Courts should be drawn to this fact and the necessity of using the proper form and filling it in properly should be impressed upon them. The printed form prescribed by the Criminal Procedure Code as amended up to date appears at No. IV of Sch. 5 and the concluding words of it read as follows :

Proclamation is hereby made that the said...of..... is required to appear at.....before this Court (or before me) to answer that said complaint on the....day of....."

K.S.B.

Revision allowed.

A. I. R. (35) 1948 Lahore 153 [C. N. 47.]

FULL BENCH

ABDUR RAHMAN, KHOSLA AND

S. A. RAHMAN JJ.

Mehar Singh — Defendant — Appellant
v. Municipal Committee, Amritsar — Plaintiff — Respondent.

First Appeal No. 145 of 1943, Decided on 26-5-1947, from order of S. A. Rahman and Din Mohammad JJ., D/- 29-5-1946.

Limitation Act (1908), Art. 149 — Applicability — Suit by Municipal Committee for possession of land belonging to Government but vested in Committee for management — Art. 149 does not apply.

Where a suit is brought by a Municipal Committee for possession of land belonging to Government but vested in the Committee for management, the Committee cannot take advantage of the sixty years' limitation allowed by Art. 149: 21 A.I.R. 1934 Lah. 960 : 153 I. C. 964; OVERRULED; *Case law referred.* [Paras 10, 19]

Cases referred:—

1. ('34) 21 A. I. R. 1934 Lah. 960 : 153 I. C. 964, Labha Singh v. Municipal Committee, Amritsar.
2. ('96) 19 Mad. 154, Municipal Commr. for the City of Madras v. Sarangpani Mudaliar.
3. ('02) 25 Mad. 535, Sundaram Ayyar v. Municipal Council, Madura.
4. ('15) 30 I. C. 13 : 2 A. I. R. 1915 Sind 4 : 9 Sind L. R. 1, Karachi Municipality v. Shamoo Ladha.
5. ('24) 11 A. I. R. 1924 Cal. 394 : 81 I. C. 675, Ananda Mohan Roy v. Kina Das.
6. ('05) 32 Cal. 129 : 31 I. A. 303 : 8 Sar 698 (P. C.), Jagadindra Nath Roy v. Hemanta Kumari Debi.
7. ('07) 30 Mad. 245 : 17 M. L. J. 174, Kootha Perumal v. Secy of State.
8. ('36) 23 A. I. R. 1936 Pat. 362 : 163 I. C. 525, B. N. W. Ry. Co. v. Janki Das.

D. R. Sawhney, Ram Krishen and D. K. Mahajan — for Appellant.

R. C. Soni and Inder Dev Dua — for Respondent.

ORDER OF REFERENCE

S. A. Rahman J.—(29th May 1946)—This appeal arises out of a suit for possession of certain lands described in the plaint, lodged by the Municipal Committee, Amritsar, against one, Mehar Singh, in the Court of Lala Ram Lal, Subordinate Judge, 1st class, Amritsar. The plaintiff's allegations were that the land belonged to Government but that it vested in the Muni-

cipal Committee for management. It was pleaded that Khasra no. 1578 out of the land in dispute, was let out to Budh Singh father of Mehar Singh, some fifty years ago, by the Municipal Committee and that subsequently, he had set up buildings on this land without the permission of the Committee. He had also encroached upon two *marlas* of land comprised within khasra Nos. 1575, 1576 and 1577. The defendant contested the suit, *inter alia*, on the ground that the land did not belong to Government and denied that it was ever leased out to Budh Singh. In the alternative, he set up a plea of adverse possession. Objection was also taken to the *locus standi* of the plaintiff to sue. It was further pleaded that the Government in an agreement dated 11-7-1935 had admitted the defendant's ownership of the land in dispute. The issues framed by the learned Subordinate Judge were as follows:

- (1) Has the plaintiff locus standi to sue ?
- (2) Is the suit within limitation ?
- (3) Did the defendant take possession of the land as a lessee from the plaintiff ?
- (4) Was the agreement dated 11-7-1935, obtained by fraud? If not, what is its effect on the suit?
- (5) Relief.

[2] The learned Subordinate Judge held that the suit land belonged to Government and that it vested in the Municipal Committee for management. He observed that as the suit must be deemed to be on behalf of the Government, Art. 149, Limitation Act governed the case. He further found that part of the suit land had originally been leased out to Budh Singh and negatived the plea of adverse possession. He held that the agreement dated 11-7-1935 was not obtained by fraud but nevertheless, according to his view it did not advance the case for the defendant to any material extent. The suit for possession was, therefore, decreed and the defendant was ordered to remove his *malba* within three months of the date of the decree. An appeal has been brought against that order by Mehar Singh.

[3] One of the main questions that falls for determination in this case is that of limitation. The trial Court has relied in this connection on a decision of this Court reported in A. I. R. 1934 Lah. 960.¹ Mr. D. R. Sawhney on behalf of the appellant has contested the finding of the trial Court on this point. He contends that the land being the property of Government, the suit by the Municipal Committee was incompetent and that in any case, the Punjab Government ought to have been made a party.

[4] Nothing turns, in my view, on the failure to implead the Punjab Government as a party to the suit. A reference to O. 1, R. 9, Civil P. C. would make it clear that no suit can be defeated by the mere misjoinder or non-joinder of par-

ties. The Court must in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It appears that the property was vested in the Municipal Committee for management although the land was owned by Government. Under the circumstances I consider that the Municipal Committee was competent to sue on the basis of its possessory title.

[5] The question, however, is whether the Municipal Committee can take advantage of the longer limitation allowed by Art. 149, Limitation Act merely because the ownership rights in the land in suit vest in the Government. The limitation for a suit for possession by the Municipal Committee would be ordinarily 12 years and in certain cases 30 years. Mr. Sawhney, on behalf of the appellant, has contended before us that A. I. R. 1934 Lah. 960¹ is really not an authority which could sustain the proposition relied on by the trial Court. That was a case of Crown land belonging to Government, which had been handed over to the charge of the Municipal Committee, Amritsar, for management. It was alleged on behalf of the Municipal Committee in that case that the defendant Labha Singh had encroached upon the property involved without any semblance of right. Labha Singh set up an adverse title and also challenged the competence of the Municipal Committee to sue. It was observed by a Division Bench of this Court in that case that since the land was admittedly Crown land handed over for management to the Municipal Committee, it followed that under Art. 149, Limitation Act, the period of limitation for a suit to recover possession on behalf of the Secretary of State for India in Council, was 60 years. It was observed, however, that no attempt was made in that case to deny the title of the Crown or the Committee, until possibly 1911-1912. In these circumstances, it was held that the suit would be clearly within time whatever view of the facts was taken. It would, therefore, appear that the question whether 60 years' limitation would be available in such a suit was not finally decided in that case. Apart from this ruling, the point seems to be bare of authority. The question is an important one which is bound to crop up frequently in the Courts of this province. It is, therefore, desirable that the point be settled by a larger Bench. I would, therefore, refer the following question for decision to a Full Bench:

"Where a suit is brought by a Municipal Committee for possession of land belonging to Government but vested in the committee for management, can the committee take advantage of the 60 years' limitation allowed by Art. 149, Limitation Act."

Din Mohammad J.—I agree.

ORDER OF THE FULL BENCH

(14th March 1947)

S. A. Rahman J.—The question referred to the Full Bench is in the following terms:

"Where a suit is brought by a Municipal Committee for possession of land belonging to Government but vested in the committee for management, can the committee take advantage of the 60 years' limitation allowed by Art. 149, Limitation Act?"

[7] The question arose for decision in a suit for possession of certain lands brought by the Municipal Committee, Amritsar, against one, Mehr Singh. The defendant had contested the suit *inter alia* on the ground that he had acquired ownership rights in the suit land as a result of adverse possession lasting for more than the statutory period. The trial Court adopted the view that the suit must be deemed to be on behalf of the Government and that Art. 149, Limitation Act, would govern the case. The suit being decreed, an appeal was brought against that decision to this Court. It came up for hearing before a Division Bench composed of Din Mohammad J. and myself. The trial Court had relied mainly on certain observations made by a Division Bench of this Court in A. I. R. 1934 Lah. 960.¹ The correctness of these observations was assailed before the Division Bench on behalf of the appellant and in view of the importance of the question involved, it was considered desirable to have it settled by a larger Bench.

[8] Article 149, Limitation Act, applies in terms to a suit by or on behalf of the Secretary of State for India in Council, the Secretary of State, the Crown Representative, the Central Government or any Provincial Government except a suit before the Federal Court in the exercise of its original jurisdiction. The suit which has given rise to the present reference is obviously not one by any of the authorities mentioned in Art. 149. The land in suit, it is stated, belongs to the Punjab Government in the present case but vests for management in the Municipal Committee, Amritsar. It was contended by Mr. R. C. Soni on behalf of the Municipal Committee that on the facts of the case it should be held that this was a suit on behalf of the Provincial Government. Strictly speaking, this question would be within the province of the Division Bench seized of the appeal, to decide. However, Mr. R. C. Soni has tried to maintain that on the averments in the plaint, it should be held as a matter of law that the suit was on behalf of the Provincial Government and therefore came within the ambit of Art. 149.

[9] This contention in my opinion is devoid of all substance. The suit was ostensibly by the Municipal Committee, Amritsar, and the Committee sought a decree for possession in its own

favour. It is no doubt set out in the plaint that the land in suit was owned by the Provincial Government and was under the charge and possession of the Municipal Committee, Amritsar. An extract from the Settlement Record attached to the plaint also bears out this position to be correct. This recital of facts cannot in my view form the foundation of an argument that the suit was on behalf of the Provincial Government. If it were a suit of that character, the inference would follow that the Provincial Government ought to be bound by any decision in the suit. Mr. R. C. Soni conceded that he held no power of attorney from the Provincial Government and that the Government may not be bound by the result of the suit. Learned counsel also referred to a letter, dated 24th May 1939, sent by the Collector, Amritsar, to the Municipal Committee (printed at page 43 of the paper book and marked Ex. 7). This letter sets out the history of the land as revealed by the revenue records and in the last paragraph requests the Municipal Committee to state within two months of the date of the letter, firstly, whether it considers it necessary that the land encroached upon should be restored to its former use so that it may continue to vest in it; and secondly, if it so considers, to state whether it is prepared to take action under the Punjab Municipal Act or to lodge a civil suit against the encroacher. The letter winds up with the following sentence :

"If no reply is received within the prescribed period, Government as owner of the land, will regard itself as free to take such action as it may deem proper: *vide* Para. 10B of the Punjab Government Consolidated Circular No. 27."

The Government Circular referred to in this letter is printed at p. 1022 of Hari Chand's Punjab Municipal Act (1934 Edition). In this circular instructions have been embodied for the guidance of local officers who have to make recommendations regarding action of Government in cases of encroachments on nazul land vested in Local Bodies. It is made clear in these instructions that in the case of encroachments which date back more than thirty years and less than sixty years, Government has liberty of action but in the case of encroachments which date back less than thirty years, Government should take direct action only after reasonable opportunity has been given to the Local Body to take action. Apparently, the Collector's letter was based on the assumption that the second alternative applied in the present case. This letter, if anything, cuts away the root of the argument advanced on behalf of the Municipal Committee. By no stretch of interpretation could the letter be construed as authorising the Municipal Committee to lodge a suit on behalf of the Provincial Government. On the contrary, it is absolutely

clear that Government has reserved its own right of action in case the Municipal Committee does not see fit to assert its own possessory right in the matter against the trespasser. I have, therefore, no hesitation in repelling the contention that the suit must be deemed to be one on behalf of the Provincial Government.

[10] The position then is that the suit must be regarded as lodged by the Municipal Committee in assertion of its own possessory right. The suit, therefore, falls within the scope of the question referred for opinion to this Bench. Article 149, Limitation Act does not in my judgment in terms apply to such a suit.

[11] I next come to the authorities. A. I. R. 1934 Lah. 960¹ is the only relevant decision of this Court cited at the bar. In that case a suit had been brought by the Municipal Committee, Amritsar for possession of Crown land entrusted to it for management against a trespasser. The suit was decreed by the trial Court and the defendant appealed to this Court. Addison and Beckett JJ. who heard the appeal made the following observations at p. 961 of the printed report :

"The first contention before us was that the committee had to prove that they were in possession before the appellant took possession and that if they did not do so, they could not sue for possession on their so called possessory title. In the first place there is no doubt that this is a suit by the Municipal Committee of Amritsar on behalf of the Secretary of State for India in Council. As already stated, even the defendant's witnesses admitted that the land was Crown land handed over for management to the Municipal Committee by the Crown. . . .

It follows that under Art. 149, Limitation Act, the period of limitation for this suit, to recover possession on behalf of the Secretary of State for India in Council is sixty years and no attempt was made to deny the title of the Crown or the Committee until possibly 1911-12. In these circumstances, there is no force in this contention as the suit is clearly within time whatever view of the facts is taken."

[12] It was found as a fact in that case that the Committee had been in possession of the suit land through a tenant within twelve years of the institution of the suit. The above observations therefore were really in the nature of obiter dicta in that case. If the learned Judge intended to lay down a rule that in all such suits, Art. 149, Limitation Act could be invoked by the Municipal Committee, I am constrained to say with all respect to the learned Judges that it does not embody a correct statement of the law. It appears that in this respect the observations of the learned Judge stand alone.

[13] In 19 Mad. 154,² the Municipality of Madras sued to recover, as forming part of a highway, a strip of land adjoining the house of the defendant, on which a pial had been erected more than forty-five years before the suit. It was held by Sir Arthur Collins C. J. and Parker J. in

that case that the defendant had acquired a title by adverse possession against the municipality which was not entitled to call in aid the provisions of Limitation Act, Sch. II, Art. 148.

[14] In 25 Mad. 635³ another Division Bench of the Madras High Court held after a review of the existing English and Indian authorities that when a street is vested in a Municipal Council, such vesting does not transfer to the municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad caelum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface, as is necessary to enable it to adequately maintain the street as a street. It was further observed that the Municipal Council has a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. The learned Judges referred to Art. 146A, Limitation Act and remarked that this Article could not be reasonably restricted to streets or roads formed by the Municipality on land belonging to or acquired by it in proprietary right. At p. 650, Bhashyam Ayyangar J. observed as follows :

"The operation of S. 28, Limitation Act (XV of 1877) upon this new Article will be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the Municipality by encroachment and thus free the land from the burden of the highway, if the person encroaching upon the highway be the owner of the land. If the owner of the land on which the highway exists, be a third party, an encroachment of a permanent character in the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the Municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, viz., twelve years, and at the expiration of thirty years the ownership thus acquired by the wrong-doer will be freed from the burden of the highway. But if the highway is dedicated to the public by the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of 60 years' adverse possession or occupation by the trespasser. The curious result, therefore, of the new Article of the Limitation Act will be that, in cases in which the site of the street belongs to the Crown, on the expiration of thirty years from the date of dispossession of the Municipality, the Crown will have the land freed from the burden of the highway and will be entitled to remove the obstruction or encroachment and after removing the same, it may again dedicate, as a highway the portion of the land thus freed from the burden If prior to the enactment of the new Article (146-A) the ordinary period of twelve years under Art. 142 or 144, as the case may be, were applicable as against the Municipality in respect of encroachments on public streets, the same result would have followed except that the highway would have been extinguished at the expiration of twelve years instead of thirty."

Certain additional issues were framed by the learned Judges in that case and remitted for trial by the lower appellate Court but the obser-

vations reproduced above already lay down in my opinion that a Municipal Council could not take advantage of the extended period of limitation provided by Article 149.

[15] A similar view was taken by the Sind Judicial Commissioners in 90 I. C. 13.⁴ In that case the plaintiff had sued the Karachi Municipality seeking a declaration of his title as against the Municipality regarding a portion of land forming a corner space adjoining a public street, alleging to have acquired the rights of the Municipality to the land by adverse possession for more than twelve years before suit. By a resolution, dated 3-11-1873, the Government had granted the beneficial interest in all waste lands within the Karachi Municipal District to the Karachi Municipality including the exclusive right of possession for ever, subject only to the right of resumption if required for a public purpose. It was held that the possession of the Municipality was not that of an agent or a servant of the Government but in its own right as a beneficial owner and that consequently the right of the Municipality to possession was extinguished by adverse possession for 12 years under S. 28 read with Art. 144, Limitation Act.

[16] There is authority for the view that a transferee or an assignee from the Secretary of State is not entitled to press into service Art. 149, Limitation Act. Reference in this connection may be made to A. I. R. 1924 Cal. 394,⁵ 32 Cal. 129⁶ and 30 Mad. 245⁷ which is equivalent to 17 M. L. J. 174.

[17] Mr. R. C. Soni on behalf of the Municipal Committee did not contest the soundness of the principle laid down in the above rulings. He drew our attention to a Division Bench judgment of the Patna High Court in A. I. R. 1936 Pat. 382⁹ and argued on its basis that the Committee was entitled in the present case to call in aid Art. 149, Limitation Act. In the Patna case Railway Company were only managing agents of the lands belonging to the Secretary of State which had been transferred by the Company to a person for cultivation under a license. The suit was brought jointly by the Railway Company and the Secretary of State for ejectment of the licensee after the expiry of the license and for rent and mesne profits. It was held that the suit would be governed by Art. 149 and not Art. 109 or 116 inasmuch as the Railway Company was merely the managing agent on behalf of the Government. The case is clearly distinguishable on the facts inasmuch as the Secretary of State was also a party to the suit. It was actually found that there was no demise in that case in favour of the Company by the Secretary of State, of lands upon which the Railway was built. The ruling, therefore, does

not support the contention advanced by learned counsel for the Municipal Committee in this case.

[18] Ordinarily, a suit by the Provincial Government would be brought in the name of the province as allowed by S. 176, Constitution Act. That procedure has clearly not been observed in the present suit. In the absence of any plea of agency or specific authorisation by the Government the Committee could only sue in respect of its own limited rights.

[19] After a survey of the authorities bearing on the point, I have come to the conclusion that the observations of the learned Judges of this Court in A. I. R. 1934 Lah. 960¹ can be supported neither on authority nor on principle. I would, therefore, answer the question referred to us in the negative.

[20] **Abdur Rahman J.**—I agree. To be a suit on behalf of the Secretary of State for India in Council, it should have been instituted under his authority or at least so as to make the decision of the suit binding on him. In fact, it could not be, in my view, found to have been instituted on his behalf unless there was an averment in the plaint to that effect either express or such as to contain it by necessary implication. In the absence of any such averment and when admittedly the result of the suit was not intended to be binding on the Secretary of State for India in Council, the plaint could not possibly be, by any stretch of imagination, held to have been filed on his behalf.

[21] **Khosla J.**—I agree.

Judgment of Division Bench

(26th May 1947.)

[22] **S. A. Rahman J.**—This is regular first appeal arising out of a suit for possession of certain land brought by the Municipal Committee, Amritsar, against Mehar Singh, son of Budh Singh. The suit was decreed by the trial Court and the defendant was ordered to remove his *Malba* from the land in suit within three months of the date of the judgment. The parties were left to bear their own costs. The defendant has appealed.

[23] The plaintiff's case as laid in the plaint was that the land in suit belonged to Government but was in the possession of the Municipal Committee, Amritsar, for management only. 4 *kanals* and 2 *marlas* out of the land in question included within present khasra No. 1578 had been leased out to Budh Singh, father of the defendant some fifty years ago as non-occupancy tenant. Later on, without the permission and knowledge of the plaintiff, the tenant had illegally constructed buildings thereon. Budh Singh had died and had been succeeded by his son, Mehar Singh. The remaining land in suit was only two *marlas* in area and was included with-

in khasra Nos. 1575, 1576 and 1577 which adjoined khasra No. 1578. This strip of land was alleged to have been encroached upon by the defendant some ten years prior to the institution of the suit and on it also, the defendant, it was stated, had set up building illegally, without the permission or knowledge of the plaintiff. These averments were traversed by the defendant in his written statement. The defendant pleaded that he and his predecessor-in-interest had been in possession of the whole of the suit land for more than eighty years and had acquired an adverse title in respect of it. It was also asserted that Government had recognised the title of the defendant in part of the suit land in 1935 when the right of the defendant to open ventilators and water spouts in his building was disputed and he then executed an agreement in favour of Government. In view of the pleadings of the parties, the issues framed by the trial Court were :

1. Has the plaintiff *locus standi* to sue?
2. Is the suit within limitation?
3. Did the defendant take possession of the land as a lessee from the plaintiff?
4. Was the agreement dated 11th July 1935 obtained by fraud? If not, what is its effect on the suit?
5. Relief.

Issues 1 to 3 were found in favour of the plaintiff and against the defendant. On issue No. 4 the finding was recorded that fraud had not been established. It was held, however, that the agreement did not help the defendant in any way for it created no estoppel.

[24] The competency of the plaintiff to bring the suit in respect of the Committee's possessory rights over the land is not now challenged on behalf of the appellant. The land undoubtedly belongs to Government and vests in the Municipal Committee for management. I would, therefore, affirm the finding of the trial Court on issue No. 1.

[25] The main contention of the parties centres on issue No. 2 in this case. The learned Sub Judge took the view that Art. 149 Limitation Act, governed the case as the suit must be deemed to be one lodged on behalf of the Government. Reliance was placed in this connection by the trial Court on a decision of this Court reported in A. I. R. 1934 Lah. 960.¹ The appeal first came up for hearing before a Division Bench composed of Din Mohammad J., and myself. In view of the importance of the question involved, the following question was referred by us, for opinion, to a Full Bench:

"Where a suit is brought by a Municipal Committee for possession of land belonging to Government but vested in the Committee for management can the Committee take advantage of the sixty years' limitation allowed by Art. 149 of the Limitation Act?"

The question thus propounded has been answered in the negative by a Full Bench of which

one of us was a member. It must be held, therefore, that the view of law adopted by the trial Court was erroneous. The Committee cannot invoke Art. 149, Limitation Act, in the present case. In respect of its own possessory rights it could come into Court only within the limitation allowed by Art. 142 or Art. 144, Limitation Act, as the case might be considering the nature of the land involved.

[26] The averments in the plaint amount to an allegation of possession and dispossession of the property in suit on the part of the plaintiff. Clearly, therefore, Art. 142, Limitation Act, governs the case and it was incumbent on the plaintiff to establish positively that the Committee had been in possession of the suit land within twelve years of the institution of the suit.

[27] There is no satisfactory evidence on the file to prove that the defendant-appellant or his predecessor-in-interest was let into possession of the suit land as a non-occupancy tenant. Our attention has been drawn to the entries in the revenue records in this connection. Undoubtedly in the settlement of 1865, the suit land was shown as a ditch and was described as Government Nazul land. In 1887-1888 the suit land was comprised within Khasra No. 1219 Min., having an area of 7 kanals 15 marlas and was described as a serai. Government was entered as the owner in the appropriate column but in the cultivator's column, the entry was as follows:

"Budh Singh, son of Sham Singh, and Dayal Singh, son of Mahn Singh, caste Arora, in equal shares possessors."

[28] The column of rent was bare of entry. This, in my opinion, is a wholly neutral entry which may be consistent either with the case of the plaintiff having leased out the land to Budh Singh or with Budh Singh having acquired possession without the semblance of a right. It does not, therefore, advance the case for the plaintiff-respondent to any extent. In 1892-93, the area of the suit land was shown as 7 kanals 16 marlas which means a slight increase of one marla over that recorded at the previous settlement. Government is again shown as the owner and for first time, in the cultivator's column, Budh Singh was recorded as non-occupancy tenant. In the column of rent, however, it was stated that the tenancy was without rent. In 1911-12, the area in the possession of Ram Lal, adopted son of Budh Singh, seems to have been reduced to 4 kanals 6 marlas but the entry is otherwise practically the same as in 1892-93. The reason for the reduction in area is not apparent. However, part of the suit land comprised within the previous Khasra No. 1526 is shown to be in the possession of the Municipal Committee and as *banjar qadim*, as compared

with the *chair mumkin abadi serai* entered against the previous Khasra No. 1527. It may be mentioned that the previous No. 1526 corresponds to the present Khasra Nos. 1575, 1576 and 1577 while the previous No. 1527 corresponds to the present No. 1578. For the year 1916-17, we have only got the entry relating to previous No. 1526 which is shown as *banjar qadim* in the possession of the Municipal Committee, Amritsar. This is repeated in 1928-29. In 1939-40, the previous Khasra No. 1526 was replaced by the present three Khasra Nos. 1575, 1576 and 1577 but they continued to be shown as *banjar qadim* or *nala* land in the possession of the Committee. In that year, No. 1527 was replaced by the present Khasra No. 1578. It was described as *ghair mumkin* houses and drinking well, in the possession of Ram Lal, adopted son of Budh Singh, non-occupancy tenant, without rent "on account of possession."

[29] From the entries as reviewed above and oral evidence on the file I am not satisfied that the Committee had succeeded in establishing the alleged tenancy at the inception of defendant's possession. As observed above, for the first time, the non-occupancy tenancy was recorded in 1892-93, but how the change was brought about, is not clear. The defendant-appellant has strenuously denied the factum of any tenancy. Since even in the revenue records, no rent was shown as payable, it is quite likely that the entry regarding the non-occupancy tenancy was a mere empty formality. It is conceded by learned counsel on behalf of the respondent that besides these entries there is no other evidence on the record to sustain the finding that at its inception, the possession of the appellant's predecessor-in-interest over Khasra No. 1578 was as a tenant under the Committee or was permissive in some other way. I would, therefore, hold that the plaintiff had not established his possession over the land in suit at least to the extent of 4 kanals 2 marlas comprised within Khasra No. 1578 (1527 previous). The case of the remaining 2 marlas included within khasra Nos. 1575, 1576 and 1577, seems to rest on a different footing and will be discussed later.

[30] The above conclusion is fortified by the fact that the buildings on 4 kanals 2 marlas of land above-mentioned, were undoubtedly erected without the consent of the Municipal Committee some fifty years ago. There is a tablet in the well included in the *Serai*, bearing the Sambat year 1924. That would indicate that the well had been constructed even earlier. It would appear, therefore, that even if initially the possession of Mehar Singh's father over the land comprised within Khasra No. 1578 was in some sense permissive, he had acquired an adverse

title by possession for over the statutory period of twelve years. The erection of the buildings constituted an overt act and amounted to a denial of title of the plaintiff Committee. It was sufficiently notorious to fix the Committee with the knowledge of the hostile claim. Over this area consequently it must be found that the defendant-appellant had acquired a good title to remain in possession, as against the Committee.

[31] With regard to the remainder of the land, two *marlas* in extent, the position is materially different. This land bore the previous Khasra No. 1526 in 1911-12 when it was shown as *banjar qadim* in the possession of the Municipal Committee itself. The entry has been consistently the same in subsequent revenue records till 1939-40. In 1934, Mehar Singh appellant himself made a statement dated 8-11-1934, before the Nazul Officer, acknowledging that he had encroached upon Khasra No. 1526 and merely wanted time to be granted to demolish his building erected over this land. Subsequently, on 27-11-1934, he made another statement to the effect that he had demolished part of the structure existing on this land and was prepared to pay the price of the rest of the land. In still another statement made on 19-1-1935, he offered to pay for this land at Rs. 7/8/- per square yard. He had thus disclaimed any right to retain this piece of land in assertion of his own right. In view of this explicit admission it cannot now be urged on behalf of the appellant that he continued to be in adverse possession of the same even if originally such a hostile claim was asserted. Mr. Dev Raj Sawhney on behalf of the appellant tried to maintain that this admission was of no consequence as it was made after the statutory period of limitation had expired even in respect of this land. This does not appear to be correct in view of the history of this strip of land as revealed by the revenue records. It was recently shown as *banjar qadim* land in the possession of the Committee. Possession follows title and, therefore, it must be found that the Committee was in possession of this part of the suit land within twelve years of the institution of the suit.

[32] The agreement dated 11th July 1935, is not now seriously pressed into service by the appellant's learned counsel as indicating Government's admission of his title to Khasra No. 1526 previous. As a matter of fact, in the agreement printed at p. 41 of the paper book, there appears to have been an inadvertent error in describing the land on to which the disputed ventilators opened as bearing Khasra No. 1526 instead of Khasra No. 1528. This is clear on reference to the evidence of Bua Ditta, Ex-Darogha, Nazul, P. W. 3. The admission of title,

therefore, if at all, related to Khasra No. 1528 and not to Khasra No. 1526 of that year.

[33] The result of the above discussion is that the appellant succeeds in respect of 4 *kanals* 2 *marlas* of land included within Khasra No. 1578 but fails with regard to the two *marlas* comprised within Khasra Nos. 1575, 1576 and 1577. I would, therefore, allow the appeal in part and dismiss the plaintiff's suit with regard to Khasra No. 1578. The decree will stand with regard to the remaining two *marlas* included within Khasra Nos. 1575, 1576 and 1577. In view of the circumstances of the case, I would allow half the costs in both the Courts to the appellant.

[34] **Ram Lall J.**—I agree.

S.C.

Appeal partly allowed.

A. I. R. (35) 1948 Lahore 159 [C. N. 48.]

MOHAMMAD SHARIF J.

Raja—Plaintiff — Appellant v. Mehr Din—Defendant—Respondent.

Second Appeal No. 2476 of 1945, Decided on 10-6-1947, from decree of Senior Sub Judge, Gujrat, D/- 9-7-1945.

Punjab Limitation (Custom) Act (1 [I] of 1920), Art. 2 (b) — Alienation by more than one person—Right to sue when arises.

Clause (b) of Art. 2 treats the entire property as one entity and the alienation as a single cause of action and where the alienors, if there were more than one, have died, a right to sue for the possession of the entire property in terms of the declaratory decree arises for the first time only when the last of the alienors has died. Till then the suit for the whole property cannot be maintained and consequently the right to sue cannot be said to have arisen. [Para 2]

Raj Kanwar — for Appellant.

Hans Raj Sodhi — for Respondent.

Judgment. — This second appeal by the plaintiff raises an important and an interesting question of law. On 14th August 1919, Mehra the uncle and Karam Din the father of the plaintiff sold land measuring 82 kanals 8 marlas in favour of Elahi Mohammad. On the usual suit for declaration brought by the plaintiff he obtained a decree on 23rd February 1922 to the effect that

"the alienation of land in suit made by plaintiff's uncle defendant 1 and his father defendant 2 in favour of Elahi Mohammad, defendant 4 on 14th August 1919, shall not affect the plaintiff's right of reversion after the deaths of defendants 1 and 2."

Karam Din, the father, died on 16th January 1933 and Mehr Din died only recently on 18th June 1943. The suit for possession out of which this second appeal has arisen was instituted by the appellant on 2nd August 1944. It was alleged that the alienors were dead and he was entitled to be put into possession of the property regarding which a declaratory decree had been obtained by him. One of the pleas taken by the

defendant was that Karam Din alienor had died long before the suit was instituted and the possession of his one-half share could not be claimed by the plaintiff as it was barred by time. The first Court decreed the plaintiff's suit in its entirety but on appeal, the learned Senior Subordinate Judge gave effect to the plea of the defendant and dismissed the plaintiff's suit as regards one-half share which was said to have belonged to Karam Din. The plaintiff has now come up in second appeal.

[2] It is contended by the learned counsel for the appellant that it was a case of a joint sale in which the declaratory decree clearly recited that the plaintiff's right of reversion shall not be affected 'after the deaths of defendants 1 and 2.' It is, therefore, argued that only on the deaths of both the alienors the plaintiff could obtain a right to sue for possession. The decision of this case depends upon the construction to be placed upon Art. 2 of Act 1 [I] of 1920 (Punjab Limitation (Custom) Act). This is as follows :

Description of suit.	Period of limitation.	Time from which period begins to run.
2. A suit for possession of ancestral immoveable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom—(a) if no declaratory decree of the nature referred to in Art. 1 is obtained.	6 years	As above.
(b) If such declaratory decree is obtained.	3 years	The date on which the right to sue accrues, or the date on which the declaratory decree is obtained whichever is later.

As in this case a declaratory decree had been obtained, cl. (b) of Art. 2 is applicable. The period from which limitation is to commence is 'the date on which the right to sue accrues.' The real question for determination is when did 'the right to sue' accrue in this case. If the right to sue accrued on the death of Karam Din which admittedly occurred about 10 years before the suit the claim as regards his share would be time-barred but if it did not and it only accrued on the death of Mehra, that is, about a year before the suit, the claim would be amply within time. The declaratory decree did not anyway state that on the death of one or the other alienor, the plaintiff would be in a position to claim possession of the share of the

deceased alienor. It was a joint sale made by two brothers and there is no material before me to indicate what was the share possessed by each in the property sold by them. Very likely it was in equal shares but that is only a presumption. In any case, the two brothers made a joint alienation which was contested by one suit and in which one decree in the terms mentioned above was awarded. Article 2 in the Schedule to Act 1 [I] of 1920 clearly contemplates a suit for possession of ancestral immoveable property which had been alienated and about which a decree had been obtained, i. e., it treated the alienation of the property as a whole and I cannot read into it words to show that a suit for a part of the ancestral property which had been alienated could also be maintained. The 'right to sue' came into existence as regards the possession of the entire ancestral immoveable property after both the alienors had died. To give it any other interpretation would mean that successive causes of action would be taken to arise on the death of one or the other alienor and in that case it would not be a suit for possession of the ancestral immoveable property but only of a fraction. It was contended by the learned counsel for the respondent that when Karam Din died there was nothing to debar the plaintiff from bringing a suit for his share. This argument is open to two objections. In the first place, it is not known what the share of Karam Din in the property alienated was, and secondly, the decree of 1922 did not clearly state that on the death of one, a suit for the possession of a share could be brought. No authority one way or the other was cited before me and I was informed by the learned counsel appearing in this case that in spite of their best efforts they could not find any and perhaps there was none on the point. In the absence of any authoritative pronouncement, we have to construe the wordings of this clause as best as we can. My own reading of this clause is that it treats the entire property as one entity and the alienation as a single cause of action and where the alienor or alienors, if there were more than one, have died, a right to sue for the possession of the entire property in terms of the declaratory decree arises for the first time only when the last of the alienors has died. Till then the suit for the whole of the property could not be maintained and consequently the right to sue could not be said to have arisen. On this view, I would hold that the plaintiff brought the suit for possession within three years of the date when he could claim the possession of the property covered by his decree. The suit is, therefore, within limitation.

[3] For the reasons given above, I would accept this appeal and restore the judgment and decree of the trial Court. As the point involved is not free from difficulty, I would leave the parties to bear their own costs throughout.

D.H.

Appeal allowed.

* **A. I. R. (35) 1948 Lahore 161 [C. N. 49.]**

SPECIAL BENCH

MUNIR, ACHHRU RAM AND MOHAMMAD SHARIF JJ.

In the matter of the Nawa-I-Waqat, Daily (Urdu), Lahore.

Abdul Hamid, Publisher of Nawa-I-Waqat, Lahore — Petitioner v. Emperor.

Criminal Original No. 25 of 1946, Decided on 31-1-1947.

(a) Press (Emergency Powers) Act (1931), S. 4 (1) (a) and (f) — Muslim League members demanding League to take direct action at once — Advice in article not to take precipitate action — Article does not fall under either clause.

Where an article contained an advice to those zealous and impetuous youths who were demanding the Muslim League to start direct action at once, without waiting any further, and to blow the bugle of war and to jump into the field, that no precipitate action should be taken unless the community had organised itself and full preparations for direct action had been made:

Held, that the article did not fall within cl. (a) or cl. (f) of S. 4 (1). [Para 3]

* (b) Press (Emergency Powers) Act (1931), S. 4 (1) (h) — "Different classes" — Meaning of — Political classes like Congress and Muslim League are not classes within clause (Per *Munir and Sharif JJ.* — *Achhru Ram J. Contra*).

Per *Munir and Sharif JJ.* — *Achhru Ram J. Contra* — The admirers of a person who is not a religious founder nor a religious leader do not constitute a class within the meaning of cl. (h). The words "different classes" in the clause refer to religious, racial, social, tribal and possibly economic or functional, but not to political classes like the Congress or the Hindu Mahasabha. If the feelings of hatred are engendered or tend to be engendered by the publication not in any such class as a whole but among the admirers or followers of a particular person, to whatever religious, racial or social class they might belong, the publication is not hit by the clause. And this position does not change either because the political leader who is criticised is accused of communalism in his policies or of partiality towards his community or because his following consists of a preponderant proportion of the members of his own community. [Para 7]

Per *Achhru Ram J.* — Where in a given case the question arises whether two political parties can be regarded as two different classes of His Majesty's subjects, it has to be decided not on any *a priori* grounds, but, like all other cases in which a similar question arises, on a consideration of the numerical importance of each party and the common attributes or characteristics binding its members together; and if, on such consideration, they are found to fulfil the tests mentioned above, i.e., possess sufficient importance numerically and

are bound together by common and exclusive attributes, there can be no reason not to hold them to be such classes. From this point of view, the Congress and the Muslim League can be regarded as two different classes within the meaning of cl. (h). [Para 21]

* (c) Press (Emergency Powers) Act (1931), S. 4 (1) (h) — Enmity or hatred — Enmity or hatred must be at least between two classes — Merely hurting feelings of one class insufficient.

Per *Munir and Sharif JJ.* — The enmity or hatred must be at least between two classes; merely hurting the feelings or susceptibilities of a class is plainly insufficient unless such feelings are hurt by another class or by some one acting on behalf of another class or unless the community whose feelings are hurt might hold the other community responsible for the offence. [Para 7]

Per *Achhru Ram J.* — All that the Court is required to see is whether, under the circumstances of the case, the offended community might not in fact hold the other community responsible apart altogether from the question whether it would be justified in doing so. What has to be taken into consideration is the probable mental attitude of the offended community having that mental attitude. In deciding whether the offended class might regard the offending community responsible for the mischief, or otherwise entertain feelings of enmity and hatred towards that community in consequence of the offence given to it, all the attendant circumstances will have to be taken into consideration. The strongest case will of course be where the offending act is actually or avowedly done in a representative capacity. [Para 27]

* (d) Press (Emergency Powers) Act (1931), S. 4 (1) (h) — Different classes — Objectionable article — Writer not representing community to which he belongs — Community is not responsible for his action.

Per *Munir and Sharif JJ.* — If the writer of an objectionable article does not represent a community and professes to speak merely for himself or on behalf of another political party, however preponderant and overwhelming the proportion of the members of a religious community in that political party may be, the community to which the writer belongs cannot as such be held responsible for the action of the writer when the attack, if it had been by a member of the religious community to which the leader belongs, could not have been said to produce class-hatred. [Para 7]

Per *Achhru Ram J.* — An attack on the leader of a religious community by a member of the same community cannot be held to create class hatred, and cannot, therefore, attract the application of S. 4 (1), for the simple reason that in such case there are no different classes between whom feelings of hatred or enmity could have been created, the community being regarded as one class. There is no analogy at all between such a case and a case where two different classes are in existence and the attack is by a member of one class on a leader of the other class. [Para 38]

(e) Press (Emergency Powers) Act (1931), S. 4 (1) (h) — Scope — Article by Muslim — Mr. Gandhi described as casuist, hypocrite and liar therein — Article held did not come within cl. (h) — (Per *Munir and Sharif JJ.* — *Achhru Ram J. Contra*).

Where, in an article by a Muslim, Mr. Gandhi was described as a casuist, a hypocrite and a liar :

Held (Per *Munir and Sharif JJ.*; *Achhru Ram J. Contra*) that Mr. Gandhi not being the founder or leader of a religious community any criticism of him did not affect the member of a "class" and the article

did not come within cl. (b), that there was nothing to show that the writer held a representative capacity or that the feelings to which he gave vent in the article were shared by the Muslim community as a whole and that Mr. Gandhi being held in veneration not only by the Hindus but by a large number of the followers of the other communities, it could not be said that the article tended to excite feelings of enmity and hatred between two different classes of His Majesty's subjects.

[Para 7]

Per *Achhru Ram J.*:—Even if Mr. Gandhi could not be regarded as a leader of the Hindus, religious or otherwise, he is, and has for a long time been the topmost leader of the Congress and the foul and filthy abuse of him in the article could not but cause very deep and bitter resentment amongst the members of the Congress and tend to create feelings of enmity or hatred between two classes of His Majesty's subjects, viz. the Congress and the Muslim League. Assuming that the Congress and the Muslim League could not be regarded as different classes within the meaning of S. 4 (1), the vituperative attack on Mr. Gandhi had a tendency to promote feelings of hatred and enmity between the Hindu and the Muhammadan communities generally and not merely to engender such feelings against the writer alone and it was wholly immaterial that Mr. Gandhi has got many followers, and many more admirers, outside the Hindu community who also might have resented the foul abuse contained in the article.

[Paras 21, 23, 26 and 31]

(i) Press (Emergency Powers) Act (1931), S. 4 (1) — Writing if falls within section—Writing as whole should be considered.

In order to determine whether a particular document, book or newspaper, falls within the ambit of S. 4 (1), the Court should consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public.

[Para 8]

(g) Press (Emergency Powers) Act (1931), S. 4 (1) (a) and (h) and Explanation 4 — Scope — Held on facts that article did not fall within either cl. (a) or (h) but was covered by Explanation 4— (Per *Munir and Sharif JJ.*—*Achhru Ram J. Contra*).

One of the speeches of Mr. Gandhi, as reproduced in the article was as follows: "If there be disturbances, people should not depend for support on the police and the military. If the Hindus and Muslims have to fight, they must fight like brave men." The writer of the article inferred from this speech that Mr. Gandhi intended to incite the Hindus to violence, the argument being that if they were not to have the assistance of the police and the military, advised as they were not to have it, they must strengthen themselves to be able to resist aggression unaided by the police and the military:

Held (Per *Munir and Sharif JJ.*—*Achhru Ram J. Contra*) that the article did not come either under cl. (a) or cl. (h) and that the case could not be taken out of Explanation 4.

[Paras 5 and 8]

Per *Achhru Ram J.*:—The case was not within the four corners of Explanation 4 and the article fell within cl. (b).

[Para 43]

(h) Press (Emergency Powers) Act (1931), S. 4 (1) (h)—Mere publication of news of communal riot — Authenticity of report not challenged — No intention to promote class-hatred — Publication is

not actionable — (Per *Munir and Sharif JJ.* — *Achhru Ram J. Contra*).

(Per *Munir and Sharif JJ.* — *Achhru Ram J. Contra*) — The mere publication of news relating to a Hindu-Muslim riot in temperate and inoffensive language by a newspaper in the ordinary course of its business, when the authenticity or the good faith of the report is not challenged and when there is nothing else to show any intention to promote class-hatred thereby, is not actionable under the Act: 26 A.I.R. 1939 Lah. 81 (F.B.), *Foll.*; 25 A. I. R. 1938 Rang. 417 (F.B.) and 34 A. I. R. 1947 Lah. 340 (F.B.), *Ref.*

[Para 10]

(Per *Achhru Ram J.*)—If the words actually used by the writer have the tendency contemplated by S. 4 it can be no defence to proceedings under the Act that the writer did not intend to promote feelings of ill-will or enmity between the two classes of His Majesty's subjects. Unlike S. 153-A, Penal Code, under the aforesaid section the intention of the author of the offending words is wholly immaterial and irrelevant except, of course, in a case where he seeks to bring his case within the purview of Explanation 4 to the section. It cannot also be said that the publication of a news-item, even though its authenticity is not questioned, can never attract the application of the statute: 26 A. I. R. 1939 Lah. 81 (F. B.), *Dissent.*; 22 A. I. R. 1935 Rang. 120 (S.B.) and 32 A. I. R. 1945 Oudh 245 (F.B.), *Rel. on*; 25 A. I. R. 1938 Rang. 417 (F.B.), *Ref.*

[Paras 48 and 56]

(i) Press (Emergency Powers) Act (1931), S. 4 (1) (h) — News-item used as argument in journalistic comment—Comment having no tendency or object to produce class-hatred — Comment is not within clause.

It is as important a part of the duty of a newspaper editor to comment on matters of public interest as to publish such matters as news, and if the publication of the news is not within the clause the mere fact that an incident is used as an argument in a journalistic comment, the comment itself not having the object or tendency to produce class-hatred, cannot bring it within the clause.

[Para 10]

(j) Press (Emergency Powers) Act (1931), S. 4 (1) (h) and Explanation 4 — Tendency to promote feelings of enmity or hatred — Article accusing Hindu Press of Punjab of communal hatred — Writer referring to certain incidents, not proved to be untrue, to show that accusation was well-founded — Article held did not come within cl. (h) and was protected by Explanation. (Per *Munir and Sharif JJ.* — *Achhru Ram J. Contra*.)

In an article a Muslim editor accused the followers of Mr. Gandhi of having started disturbances at Calcutta, Bombay and Allahabad. In another article he accused the Hindu newspapers of the Punjab of inciting the Hindus to break the peace by publishing false and inflammatory reports about the Calcutta happenings and alleged that the trouble in Calcutta was started by the Congressites and that theirs was the blackest record of oppression and barbarity. It was further alleged that in Bombay the Muslims became the target of cruelty and oppression, that the Muslims were the victims of a scheme of violence organized by the Hindu Congressites, that Kher's Hindu police also oppressed the Muslims only, that the oppression was still going on and that notwithstanding all this the Muslims were held to be oppressors by the Hindu Press of Lahore.

Held (Per *Munir and Sharif JJ.*; *Achhru Ram J. Contra*) that the articles did not come within cl. (b) and that if in his attempt to show that the accusation that the Hindu Press of the Punjab was spreading

communal hatred by publishing false and inflammatory reports about certain incidents was well-founded, the writer referred to some incidents which were not proved to be untrue, it could not be said that he intended to bring about a result for which he condemned others, and in this view of the matter the comment itself was protected by Explanation 4. [Paras 9 and 10]

Per *Achhru Ram J.*—The articles had the tendency mentioned in cl. (h), even if the assertions contained in them about the Hindus being the aggressors in the communal disturbances were assumed to be true in their entirety. [Paras 55 and 56]

(k) Civil P. C. (1908), O. 3, R. 4—Power to make admissions — Admission on question of law by Advocate-General — It does not bind Crown.

Per *Achhru Ram J.* — Any admission by the Advocate-General on a question of law cannot bind the Crown nor can it stand in its way of deciding the case by the High Court according to its view of the law. [Para 22]

Annotation:— ('44-Com.) C. P. C., O. 3, R. 4, N. 5

(l) Press (Emergency Powers) Act (1931), S. 4 (1) (h)—Tendency to promote feelings of enmity or hatred — Words, whether have such tendency—Decision as to — Points to be considered, stated.

Per *Achhru Ram J.* — In deciding whether the words used in a particular case, whether spoken or written, tend directly or indirectly to create feelings of hatred or enmity between two classes of His Majesty's subjects, or only to create feelings of bitterness and resentment in the minds of the members of one such class against the person responsible for uttering or writing those words individually, should be decided, in each case, having regard to the nature and the implications of the words used, the person who has used them, the occasion for the use, the state of feelings between the two classes at the material time and the manner of the publication of those words. [Para 31]

(m) Press (Emergency Powers) Act (1931), S. 4 (1)—Single obnoxious sentence is actionable.

Per *Achhru Ram J.* — Even a single sentence, if obnoxious to the first sub-section of S. 4, may justify action under the Act: 18 A. I. R. 1931 Lah. 283 (F.B.), *Foll.* [Para 47]

(n) Press (Emergency Powers) Act (1931), S. 4 (1), Explanation 4 — Explanation does not imply that there must be malicious intention for applicability of section.

Per *Achhru Ram J.* — The explanation simply makes an exception in favour of a person who does an otherwise objectionable act honestly, with a lawful object, and without any malicious intention. It does not at all imply that the substantive part of the section is not applicable unless a malicious or dishonest intention can be attributed to the doer of the Act : 26 A. I. R. 1939 Lah. 81 (F. B.), *Dissent.* [Para 51]

(o) Press (Emergency Powers) Act (1931), S. 4 (1) — Duty of Court — Liberty of Press — Court should act as guardian of such liberty — Words of statute restricting liberty—Effect must be given to them.

Per *Achhru Ram J.* — It is the duty of Courts of justice to act as the guardians of the liberty of the Press. However, if the words of the statute restricting such liberty are quite clear, a Court of justice cannot refuse to give effect to them on grounds of hardship. That the provisions of the statute are too drastic or have the effect of placing very irksome and even undesir-

able restrictions on the Press may be a ground for the Executive to use those provisions sparingly and with circumspection but they can be no ground for the Court to read into them reservations and qualifications which do not exist. [Para 60]

Cases referred :—

1. ('27) 14 A. I. R. 1927 Lah. 594 : 104 I. C. 234 : 28 Cr. L. J. 794, *Devi Sharan Sharma v. Emperor.*
2. ('28) 50 All. 157 : 14 A. I. R. 1927 All. 654 : 104 I. C. 225 : 28 Cr. L. J. 785, *Emperor v. Kalicharan.*
3. ('36) 23 A. I. R. 1936 All. 314 : 58 All. 849 : 162 I. C. 507 : 37 Cr. L. J. 599 (S B), *Gupta v. Emperor.*
4. ('39) 26 A.I.R. 1939 Lah. 81 : 180 I. C. 835 : 40 Cr. L. J. 497 (F B), *Parmanand v. Emperor.*
5. *Reported in* ('47) 34 A. I. R. 1947 Lah. 340 : 48 Cr. L. J. 915 (F B), *In the matter of the Daily Zamindar.*
6. ('38) 25 A. I. R. 1938 Rang. 417 : 178 I. C. 433 (F B), *In the matter of Sun Press, Ltd.*
7. ('22) 3 Lah. 405 : 10 A.I.R. 1923 Lah. 61 : 71 I. C. 519 : 24 Cr. L. J. 167 (S B), *Rajpal v. Emperor.*
8. ('33) 57 Bom. 253 : 20 A. I. R. 1933 Bom. 65 : 141 I. C. 780 : 34 Cr. L. J. 231, *Emperor v. Miss Maniben.*
9. ('41) 28 A. I. R. 1941 Oudh 33 : 190 I. C. 887 : 42 Cr. L. J. 40, *Vishambar Dayal v. Emperor.*
10. ('40) 27 A. I. R. 1940 Bom. 379 : 191 I. C. 212 : 42 Cr. L. J. 121, *Narayan Vasudev v. Emperor.*
11. ('34) 21 A. I. R. 1934 Lah. 219 : 149 I. C. 370 : 35 Cr. L. J. 966 (SB), *In the matter of Zamindar Newspaper, Lahore.*
12. ('27) 14 A. I. R. 1927 Lah. 590 : 103 I. C. 769 : 28 Cr. L. J. 721, *Raj Paul v. Emperor.*
13. ('32) 13 Lah. 152 : 19 A. I. R. 1932 Lah. 99 : 142 I. C. 792 : 34 Cr. L. J. 473 (S B), *Chamupati v. Emperor.*
14. ('36) 23 A. I. R. 1936 All. 314 : 58 All. 849 : 162 I. C. 507 : 37 Cr. L. J. 599 (F B), *M. L. C. Gupta v. Emperor.*
15. ('31) 12 Lah. 345 : 18 A. I. R. 1931 Lah. 283 : 132 I. C. 889 : 32 Cr. L. J. 997 (F B), *Prithvi Dass Sharma v. Emperor.*
16. ('35) 13 Rang. 98 : 22 A. I. R. 1935 Rang. 120 : 156 I. C. 135 : 36 Cr. L. J. 871 (SB), *In the matter of Sun Press, Ltd.*
17. ('45) 20 Luck. 235 : 32 A.I.R. 1945 Oudh 245 : 220 I. C. 118 : 46 Cr. L. Jour 658 (F B), *Abid Ali Khan v. Government of the United Provinces.*

Mohammad Amin and Ghulam Mohy-ud-din — for Petitioner.

B. K. Khanna, Advocate-General—for the Crown.

Munir J. — This is a petition under S. 23, Indian Press (Emergency Powers) Act 23 of 1931. The petitioner is Abdul Hamid who, by an order of the Provincial Government, dated 7th October 1946, has been required under S. 7 (3) of the Act to deposit with the District Magistrate, Lahore, security to the amount of Rs. 3,000 on the ground that three articles headed "*Darazdasti-i-een kotah aitinan bin*" "*Sabr aur Zabt ae kam lijie*" and "*Hadisa-i-Jullundur ke mutāaliq*", published in the issues of the Urdu Daily, Nawa-i-Waqat, of which the petitioner is the Editor, of 10th, 12th and 13th September 1946 respectively, contain words of the nature described in cls. (a), (d) and (h) of sub-s. (1), S. 4 of the Act. The order itself does not

specify which article falls under which clause but the position of the Crown in this respect has been clarified before us by the learned Advocate-General who has appeared to oppose the petition.

[2] The translations of these articles are printed at pp. 5 to 7 of the paper book as Exs. B, C and D, Ex. B being the article headed "*Daras-dasti-i-een kotah astinan bin*", Ex. C being the article headed "*Sabr aur zabt se kam liji*", and Ex. D being the article headed "*Hedisa-i-Jullundur ke mutaaliq*" and are as follows:

Ex. B. "Look at the high-handedness of these short-sleeved persons.

The greatest deed of Mr. Mohan Das Karam Chand Gandhi is this, that he has given to false speaking and false writing the status of a fine art. He always says and writes the thing in which the benefit of his party is concealed. But, the mode of his talking is so saintly, that ignorant persons think that he is an angel, and not a human being, and that his skirt is not besmeared with the polluted stains of party feeling. But, those who understand Mr. Gandhi, know fully well that it is only falsehood which has been enwrapped in the cover of saintliness. Mr. Gandhi observed mysterious silence for several days with regard to the distressing disturbances at Calcutta, but now he is making statements one after the other. During the last three days, he in his peculiar mode, benefited the world with the following directions:

1. If there be disturbances, the public in general should not take help from police and the military. If, at all, the Hindus and Muslims have to fight, they should fight like brave men.

2. Some persons feel happy over this that now the Hindus, too, can wreak vengeance and kill others. But their happiness is unjustified.

3. The attitude of Mr. Jinnah is molesting and pitiable. But the other persons should walk on the right path. If they walk on the right path, Mr. Jinnah too will be forced to resort to the right path.

These words, language and mode are saintly. In the language of ordinary human beings, the directions of Mr. Mohan Das Karam Chand Gandhi, mean as follows:

(1) One should not depend upon the help of the police and the military. Hindus should offer resistance after strengthening themselves. They and the Muslims should fight with one another without taking help from the police and the military. The Government should not call the police and the military.

(2) It is the Muslims who start disturbances. The Hindus only retaliate.

(3) Mr. Jinnah is not on the right path. He is in the wrong.

Had this thing been said by some other person, he would have been regarded as an instigator and mischief-monger. But, as this preaching of violence, and sermon of falsehood, have come from Mr. Gandhi in his peculiar mode, they will be taken to be the lecture of a Mahatma (Saint) and welcomed.

The above-mentioned directions of Mr. Gandhi are highly provoking. Although he knew that his followers started disturbances at Calcutta, Bombay and Allahabad, yet he with great cunningness, throw the entire responsibility therefor, on the shoulders of the Muslims. Similarly, despite the fact that he fully understood the causes of the bad relations between the Hindus and the

Muslims, he held Mr. Jinnah to be in the wrong. But the most dangerous advice of Mr. Gandhi is, that help should not be taken from the police and the military and that Hindus and the Muslims may fight like brave men. He calls himself to be an incarnation of non-violence. It is not becoming of an incarnation of non-violence to preach violence openly. Again, it is the same Mr. Gandhi who supported the lathi charge and firing by the police and the military for making the labourers' strike unsuccessful. It is the same Mr. Gandhi who condemned the Bengal Ministry for their not having called the military on the very first day of the disturbance. We are at a loss to understand the final cause of his contradictory view point.

In C. P. the Congress Ministry is taking help of the police lathies for suppressing the agitation of the depressed classes. On the 3rd September, the Premier of the C. P. said in the Assembly that the lives of some of the members of the ministerial party were in danger, and that, therefore, the said arrangements were necessary. C. P. is the province which now-a-days can be proud of being the headquarters of Mr. Gandhi. If in C. P. the police help is necessary to save some Hindu members from the alleged danger at the hands of the depressed classes, why is the help of the police and the military forbidden for saving the innocent and the unarmed citizens: who during disturbances generally fall victim to Goondaism?

The small Hindu-Congress leaders, and the Hindu Congressite papers were preaching violence but it is a pity that most responsible Hindu Congress leader has also adopted the same wrong attitude."

Ex. C: "Act with patience and self-restraint. Letters in connection with direct action are being daily received from zealous young men in which great restlessness and uneasiness is being given vent to and it is being demanded that the League should blow the bugle of war without any delay and that young men are anxious to jump into the field.

While fully respecting the sentiments and zeal of these brothers of ours, we request them to act with patience and self-restraint. It is not an ordinary thing to start direct action movement. In the political history of the Muslims of India this would be the greatest step taken so far. It is, therefore, not proper to take any step without complete preparation and firm resolution and care. Passion and enthusiasm are very precious jewels, but no advantage can at all be derived from them without proper preparation and full deliberation. The moment whatever be available for preparation should be considered by the Muslims a blessing and full benefit should be derived from it. Hastiness is in no way beneficial. It is rather generally harmful. As a matter of course also, the direct action movement neither can be nor should be started so soon. The Congress after giving ultimatum to start its movements waited for several months together, and gave orders for march after making complete preparation. We have no hope that the Muslim League will get so much time. However, whatever time we get, should instead of being wasted be utilized in making preparations. Not only the Provincial Leagues, District Leagues, City Leagues and primary Leagues, and their office-holders but also every Muslim should make preparation for the direct action, with the idea that the success of the movement depends upon his preparation and his power of endurance. If all the Muslims act with this idea in view, their zeal will prove tenfold beneficial for their community."

"About the Jullundur incident. The Hindu Sabhaite-Congressite newspapers of the Punjab seem to be bent upon creating disturbances in the province. These newspapers by publishing false and inflammatory re-

ports of so-called eye-witnesses about Calcutta happenings created communal tension in the Punjab and although it had become an admitted fact that the trouble in Calcutta was started by the Congressites and their's was the blackest record of oppression and barbarity also, the Hindu Sabhaite Press of Lahore incited the Hindus against the Muslims. In Bombay too, the Muslims became the target of cruelty and oppression. The Hindu Congressite acting under an organized scheme of violence made the Muslims the target of oppression. Mr. Kher's Hindu Police also oppressed the Muslims only. This oppression is still going on. But the Hindu Press of Lahore continued holding the Muslims to be the oppressors.

Now an ordinary dispute has taken place at Jullundur. Had the authorities been not prudent, the fire would certainly have spread. But they brought it under control in time and nipped the evil in the bud. The Hindu Newspapers of Lahore, on the other hand, want to fan the extinguished fire at Jullundur and destroy the peace and tranquillity of the Punjab. On a careful perusal of today's Hindu newspapers only and reading their reports it will transpire how the Hindu Press makes a mountain of the mole hill. In the report of the 'Vir Bharat' the Muslims have been called Goondas, about six times. It reports that the dispute was over the teasing of a woman and that this alleged mischief was done by only one person. The report of the 'Milap' is that the Muslims had hatched an organized plot. Arms were distributed on that day early in the morning. A huge gathering of about 500 persons collected behind the Sanatan Dharam High School. They were armed with lathis etc. Some Goondas from amongst them entered the City, went to the fair and began teasing the ladies.

Of all the reports that of the 'Partap' is, as usual, most irresponsible. It says that Mr. Liaquat Ali Khan sent a circular giving instructions to the members of the League to have disturbance created at Jullundur from 9-9-1946 to 11-9-1946, to avenge the Calcutta (happenings?), at Jullundur. (In other words it is now being admitted that it were the Hindus who committed atrocities in Calcutta.) According to the version given by the 'Partap' a party of the Goondas of the League party went to the fair and began molesting the Hindu ladies. The person who has prepared this report is very mean and low. To think that by publishing false reports about molestation of their sisters, they are disgracing the opposite party is not only foolish but also mean.

The gutter newspaper of Lahore writes "The League Goondas teased Hindu ladies and when they were asked to desist they came up armed in hundreds."

We are surprised as to what has happened to the self-respect of these Hindu journalists. It is the good luck not only of the people of Jullundur but also of the Punjabees that the Jullundur incident did not take a serious turn. In spite of the clear excesses on the part of the Hindus, the Muslim newspapers kept quiet over this matter, because we do not like to fan the fire of disturbance by plunging into this discussion. But the Hindu Press of Lahore wants to ply with this fire. May God grant sense to these brave persons whose dhotis become wet even on hearing the threats of jesters on the telephone, and may they take pity on the lamentable condition of the Punjab."

[3] The article Ex. C need not detain us long. This article contains an advice to those zealous and impetuous youths who are demanding the Muslim League to start direct action at once and without waiting any further. The demand of these young men from the League is to blow

the bugle of war and to jump into the field but the Editor's advice to them is that no precipitate action should be taken unless the community has organized itself and full preparations for direct action have been made. The learned Advocate General did not seriously contend that this article comes under any of the clauses of sub.s. (1) of S. 4 of the Act though he faintly alluded to cl. (a) and I myself think that possibly the Government had also cl. (f) in view when the order in question was made. The programme of direct action has not as yet been chalked out and the words themselves have not yet been defined by anybody and therefore it is impossible to infer from this article that it tends directly or indirectly to incite to or to encourage the commission of any offence of murder or any cognizable offence involving violence or to hold that it contains words which encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order. The words "blow the bugle of war" and "to jump into the field" are merely metaphoric and do not mean that the League party from whom the demand is made should rise in revolt against Government and indulge in the commission of murder or other cognizable offences involving violence. Nor can the demand to resort to direct action be taken to mean an encouragement or incitement to persons to interfere with the administration of the law or with the maintenance of law and order, "direct action," as already pointed out, being at present too vague and inchoate a matter to be capable of any clear comprehension by any body. And then there is the most important point, namely, that the Editor does not see eye to eye with these impetuous youths and on the other hand advises them to wait and not to take any precipitate action. No doubt the article advises these men to prepare themselves for the programme that may eventually, if at all, be chalked out but it is impossible from this advice to infer that the article tends to incite or encourage them to commit the offence of murder or any other cognizable offence involving violence or to incite or encourage them to interfere with the administration of the law or with the maintenance of law and order or to commit any offence. The article, therefore, does not fall within cl. (a) or cl. (f) of the Act.

[4] The article of 10th September (Ex. B) is a criticism of Mr. Gandhi's utterances and activities. It is headed "*Darazdasti-i-eem kotah astinan bin*" but its force can only be gathered if the other portion of the couplet of Hafiz of which the heading is only a part is reproduced. The full couplet is "*Bazer-i-dalq-i-maragga kamand-ha-darand Darazdasti-i-een kotah*

*astinan lin.*⁴ Translated, it means "Don't you go by the variegated patches on the cloaks of these sanctimonious people. Underneath their cloaks is many a noose and though their arms are short, their reach is wide." The central idea of the article is that Mr. Gandhi though he professes to be a saint and lover of truth is in fact a casuist, a hypocrite and a liar. The article refers to three utterances which Mr. Gandhi is said to have made recently and the writer seeks to infer from them an incitement to violence. The three sayings of Mr. Gandhi, as reproduced in the article, are as follows:

(1) "If there be disturbances, people should not depend for support on the police and the military. If the Hindus and Muslims have to fight, they must fight like brave men."

(2) Some people are exulting that now the Hindus also can take revenge and kill others. This rejoicing is improper.

(3) Mr. Jinnah is pursuing a wrong policy but if others tread the right path, Mr. Jinnah also will return to it."

[5] The writer's criticism of the first and second speeches of Mr. Gandhi is that they have a tendency to incite the people to violence, and that Mr. Gandhi wrongly lays the whole blame for the communal disturbances on the Muslims. The writer infers from the first speech that Mr. Gandhi intends to incite the Hindus to violence, the argument being that if they are not to have the assistance of the police and the Military, advised as they are not to have it, they must strengthen themselves to be able to resist aggression unaided by the police and the military. From the advice that the police and military should not be called in if the Hindus and the Muslims have to fight he infers that Mr. Gandhi incites them to fight.

[6] The second speech of Mr. Gandhi is taken by the writer to refer to the exultation of the Hindus over the result of communal disturbances in certain places where the Hindus killed the Muslims. As the killing is said to be in revenge, the writer infers that Mr. Gandhi intended to suggest that elsewhere the Muslims were the aggressors and that in places where the Hindus killed the Muslims the Hindus acted only in retaliation. The writer concludes by alleging that as Mr. Gandhi's followers started the trouble in Calcutta, Bombay and Allahabad, the allegation that the Hindus acted only in retaliation was false; that Mr. Gandhi welcomed the aid of the police and the military where it suited his followers to have such aid and the advice to his followers not to depend upon the aid of the police and the military was hypocritical; and that his advice to his followers to fight the Muslims without the aid of the police and the military was contrary to his claim as a preacher of non-violence.

[7] There are three objections to this article: (1) that the disrespectful and strong epithets used about Mr. Gandhi, inasmuch as the article describes him as a casuist, a hypocrite and a liar, brings this portion of the article under clause (h) of sub-s. (1) of S. 4, Press (Emergency Powers) Act because the words used tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects. The reply of the learned counsel for the petitioner to this objection is that Mr. Gandhi has not been criticised as a religious founder or a religious leader, a capacity which he has never claimed, and never been known by the public to possess, and that this criticism of his is merely in his capacity of a political leader. It is conceded by the learned Advocate-General that if the criticism relates to Mr. Gandhi as a political leader, the article would not be hit by clause (h) but it is contended by him that the reference here to Mr. Gandhi is as a communal and not as a political leader. It is further conceded that Mr. Gandhi is neither a religious founder nor a religious leader but it is urged that the mere fact of his being a Hindu by conviction and practice and of his being respected by the Hindu community in general is sufficient to make this article create feelings of enmity or hatred between different classes of His Majesty's subjects. I am unable to accept this contention as correct inasmuch as Mr. Gandhi being neither a religious founder nor a religious leader, though an abuse of him may excite feelings of hatred or enmity among his followers against the writer of the article, it does not directly or indirectly tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects. The abuse may be resented by any one who holds Mr. Gandhi in respect and reverence, be he a Hindu, a Muslim, a Sikh, a Christian or a Parsee. The essential point about clause (h) is that the words must directly or indirectly tend to promote feelings of enmity or hatred between different classes of His Majesty's subjects and the admirers of a person who is not a religious founder nor a religious leader do not constitute a class within the meaning of this clause. If the contention were correct, we should be driven to the conclusion that any disrespectful reference to a person who is held in esteem by a section of the population, be he a political leader, a poet, a painter or an actor, would fall within the clause. The words "different classes" in the clause refer in my opinion to religious, racial, social, tribal and possibly economic or functional, but not to political classes like the Congress, the Hindu Mahasabha or the Indian National Congress. If the feelings of hatred are engendered or tend to be engendered by the publication in a religious,

racial or social class as such, the publication would be hit by the clause but not where such feelings are engendered or tend to be engendered not in any such class as a whole but among the admirers or followers of a particular person, to whatever religious, racial or social class they might belong. And this position does not change either because the political leader who is criticised is accused of communalism in his politics or of partiality towards his own community or because his following consists of a preponderant proportion of the members of his own community. In the present case, Mr. Gandhi not being the founder or leader of a religious community any criticism of him does not affect the members of a "class" and however deplorable and in bad taste the publication may be it does not come within the clause. Apart from this, the enmity or hatred must be at least between two classes. Merely hurting the feelings or susceptibilities of a class is plainly insufficient unless such feelings are hurt by another class or by some one acting on behalf of another class or unless the community whose feelings are hurt might hold the other community responsible for the offence. If the publication may in certain circumstances be held to be a representative act of the community, as was the case in A. I. R. 1927 Lah. 594,¹ the case may possibly fall within clause (b) but in the absence of any such evidence the case is clearly outside the terms of this clause, though clause (d) might apply when the class or section itself, as distinguished from its leader, is brought into hatred or contempt. In the present case, there is nothing to show that the petitioner holds a representative capacity or that the feelings to which he gives vent in this article are shared by the Muslim community as a whole. It is conceded, and it is a matter of common knowledge, that Mr. Gandhi is held in veneration not only by the Hindus but by a large number of the followers of the other communities including the Europeans, the Sikhs, the Christians, the Parsees and the Muslims. A Muslim may take as much umbrage from the publication as a Hindu and it cannot, therefore, be said that the article tends to excite feelings of enmity and hatred between two different classes of His Majesty's subjects. It is admitted that if the publication in question had been by a Hindu, Mr. Gandhi's leadership not extending over the whole of the Hindu community, or by a Sikh or a Parsee, the tendency or the result would not have been class hatred and I cannot accept the position that the mere fact of the writer being a Muslim must be deemed to have that tendency or result. The feelings of hatred and enmity in such a case are against the writer of the article or the

party represented by the writer and not the community to which he might belong. It is a moot question whether a scurrilous and vituperative attack by an individual even on the founder of a religion comes within S. 153A, Penal Code. In 50 ALL. 157,² the scurrilous book was found to have been written in the prosecution of a propaganda of which there is no evidence in this case but in A. I. R. 1936 ALL. 314,³ there are undoubtedly some observations which tend to support the contention that the mere fact of a writer abusing the religious founder of another community tends to excite feelings of hatred and enmity against the members of the community to which the writer belongs. With the greatest respect, I regret I am unable to accept this general statement. That precise question, however, does not arise in this case because we are not dealing with an attack on the founder of a religion but with an attack on a national leader, feelings of respect and veneration for whom are not confined to a particular community, and if the writer does not represent a community and professes to speak merely for himself or on behalf of another political party, however preponderant and overwhelming the proportion of the members of a religious community in that political party may be, the community to which the writer belongs cannot as such be held responsible for the action of the writer when the attack if it had been by a member of the religious community to which the leader belongs could not have been said to produce class-hatred. In a case like the present, the result is not such class-hatred as is contemplated by cl. (h) even though the result may actually be class-hatred in the sense that the feelings of the followers of a particular political leader are excited against the followers of another political party. If the law were otherwise, any criticism of a man, irrespective of the position that he occupies as a religious founder or leader, would be hit by the clause and produce an intolerable result. Any vulgar comment on the founder or exponent of a particular school of art and any attack on the leader of a section of the members of the depressed classes or on the founders or leaders of minor political organizations in the Muslim or the Hindu community would fall within the clause rendering it impossible for the Press to function even within the narrowest limits. This I consider was not the intention of the Legislature. I, therefore, hold that the article in question is unexceptionable on this ground.

[8] The second portion of the article in which the writer intends to convey that Mr. Gandhi is preaching to his followers to strengthen themselves and not to depend on the aid of the police or the military and is inciting the Hindus and

the Muslims to fight like brave men is objected to on the ground that it falls within cl. (a) and (b) of sub-s. (1) of S. 4 of the Act. The contention is that since according to the writer Mr. Gandhi incites his followers to violence, the Muslim leaders of the publication may take it to mean that the writer is asking them similarly to organize themselves and to fight against the Hindus. I am unable to hold that this is a necessary or even a possible inference from the article and unless it be held that the writer directly or indirectly is inciting his readers to commit the offence of murder or any cognizable offence involving violence or that the article directly or indirectly tends to promote feelings of enmity or hatred between different classes of His Majesty's subjects, it does not fall within cl. (a) or cl. (b) of the sub-section. In the first place, the writer nowhere says that because Mr. Gandhi is advising his followers to organise themselves and to fight with the Muslims without the aid of the police or the military, the Muslims should do the same, and in the second place, a mere advice to the members of a community to organise themselves cannot be said to be an incitement, direct or indirect, to commit the offence of murder or any cognizable offence involving violence. The position may, however, be different if the writer incites his community or party to crush or destroy the opposite community or party. What cl. (a) requires is that the publication should directly or indirectly tend to incite the commission of an offence and this tendency cannot be inferred from the mere fact that according to the writer a leader of a rival community is in an indirect way asking his followers to organize themselves in order to defend themselves without the aid of the police or the military. The important point about the article is that the writer accuses Mr. Gandhi of indirectly preaching communal hatred and violence when he claims himself to be an apostle of non-violence, and it expressly deprecates such preaching. In this view of the matter, the article, inasmuch as it is sought to be brought under cl. (b), also falls under Explanation 4 to the section because the writer points out matters, namely, the alleged utterances of Mr. Gandhi, which in the writer's opinion are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects. The main point that this article seeks to make is that Mr. Gandhi should refrain from making speeches of the kind attributed to him inasmuch as they may be taken by his followers as sermons of violence and hatred. In order to determine whether a particular document, book or newspaper, falls within the ambit of S. 4(1), Press (Emergency Powers) Act, the Court should consider the writ-

ing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public. And where a party relies on Explanation 4 to S. 4 of the Act, the advice must be read with the imputation and, read in this manner, it is not possible to hold that the article in question preaches or encourages violence or tends to produce class-hatred. It was contended by the learned Advocate General that the Exception is inapplicable because Mr. Gandhi has been misrepresented and that, therefore, the article cannot be said to have been written without malicious intention. Learned counsel for the petitioner stated that the report was correct and in support of this assertion he attempted to read to us another newspaper in which also Mr. Gandhi's speech was reported but since that newspaper had not been exhibited with the petition and there was no application before us by either party to take evidence we refused to put that newspaper on record or to treat it as evidence, and since there is no affidavit by the Crown alleging that the report of the speech is false, it must be taken to be true. The case is sought to be taken out of the fourth Explanation also on the ground that the inference sought to be drawn by the writer from the speech of Mr. Gandhi wherein he is alleged to have said that if the Hindus and the Muslims have to fight they must fight like brave men is not only incorrect but dishonest inasmuch as whereas all that Mr. Gandhi stated was that if these two communities have to fight, they must fight like brave men, the writer seeks to represent that Mr. Gandhi is advising them to fight. It is, however, clear that the point emphasised by the writer is that Mr. Gandhi should not postulate the possibility of the two communities fighting with each other and on that assumption advise them how to fight but that apostle of non-violence as he is, he must unequivocally and without any qualification dissuade them from fighting under all circumstances, inasmuch as contemplation of that possibility taken together with the advice how to fight might itself tend to incite the communities to fight. I do not, therefore, think that there was any intellectual dishonesty on the part of the writer in drawing certain inferences from the speech of Mr. Gandhi even though they may not be justified by a strict process of reasoning. The case is not, therefore, taken out of the exception on this ground and I hold that this portion of the article does not come either under clause (a) or clause (b) of sub-section (1) of S. 4 of the Act.

[9] The third portion of the article is that in which the writer accuses the followers of Mr. Gandhi of having started disturbances at Calcutta, Bombay and Allahabad and this part of the case may be dealt together with the third article (Ex. D) published in the issue of 13-9-1946. In that article the writer accuses the Hindu newspapers of the Punjab of inciting the Hindus to break the peace by publishing false and inflammatory reports about the Calcutta happenings and alleges that the trouble in Calcutta was started by the Congressites and that theirs was the blackest record of oppression and barbarity. It is further alleged in this article that in Bombay the Muslims became the target of cruelty and oppression, that the Muslims were the victims of a scheme of violence organized by the Hindu Congressites, that Kherr's Hindu police also oppressed the Muslims only, that the oppression is still going on and that notwithstanding all this the Muslims are still held to be oppressors by the Hindu Press of Lahore. The question is whether this article together with that portion of the article dated 10-9-1946 in which the writer accuses the followers of Mr. Gandhi of having started the disturbance at Calcutta, Bombay and Allahabad, has directly or indirectly a tendency to create class-hatred. We have no evidence before us to determine whether these allegations are true or not as no affidavit has been filed by the Crown under Rule 10 of the Rules framed by this Court under the Press (Emergency Powers) Act and, therefore, for the purposes of the decision of this case they have to be taken as true. Starting with this assumption, learned counsel for the petitioner relies on the decision of this Court in A. I. R. 1939 Lah. 81,⁴ and argues that if the origin of the communal riots in the various places mentioned in these two articles is correctly described, a mere publication of them does not come within clause (h) of sub-section (1) of S. 4 of the Act. The decision in A. I. R. 1939 Lah. 81⁴ is being followed by another Special Bench of this Court in Criminal Original No. 30 of 1946,⁵ in which the main judgment is being delivered by my brother Bhandari and where in a short note I have expressed my own views in the matter. The Rangoon Court also has come to the same conclusion in A. I. R. 1938 Rang. 417,⁶ and no authority has been cited before us where it might ever have been held that the publication of mere newspaper information is also hit by clause (h) of S. 4 (1) of the Act. Unless, therefore, we can distinguish the present case from A. I. R. 1939 Lah. 81,⁴ I feel it to be my duty to follow it, the correct course for the Government if they are dissatisfied with that decision being the removal of any ambiguity in the law by having it amended.

[10] The publication objected to in A. I. R. 1939 Lah. 81⁴ gave an account of a communal riot in which the Muslims were alleged to have been the aggressors in several respects and it was contended by the Crown that the publication tended to create feelings of hatred and enmity between the Hindus and the Muslims. Bhide J., who delivered the judgment with which Young C. J. and Blacker J. agreed, held that what is intended to be penalized by clause (h) is language which *per se* tends to promote feelings of hatred and enmity between different classes and that the mere publication of news relating to a Hindu-Muslim riot in temperate and inoffensive language by a newspaper in the ordinary course of its business when the authenticity or the good faith of the report is not challenged and when there is nothing else to show any intention to promote class-hatred thereby is not actionable under the Press (Emergency Powers) Act. In the present case if the truth of the assertion that in the recent communal disturbances the Hindus were the aggressors in several places is assumed, as in the absence of any allegation to the contrary in an affidavit it must be, I cannot discover any ground on which it could in principle be distinguished from A. I. R. 1939 Lah. 81.⁴ The reference to the communal disturbances in the present case may not be in the nature of mere information but it is as important a part of the duty of a newspaper editor to comment on matters of public interest as to publish such matters as news, and if the publication of the news is not within the clause the mere fact that an incident is used as an argument in a journalistic comment, the comment itself not having the object or tendency to produce class-hatred, cannot bring it within the clause. In the present case, the writer accuses the Hindu Press of the Punjab of spreading communal hatred by publishing false and inflammatory reports about certain incidents, dissuades them from "fanning the fire" and asks them to "take pity on the lamentable condition of the Punjab", and if in his attempt to show that the accusation is well-founded he refers to some incidents which are not proved to be untrue, it cannot be said that he intends to bring about a result for which he condemns others, and in this view of the matter the comment itself is protected by the fourth Explanation to sub-section (1) of S. 4, Press (Emergency Powers) Act.

[11] I hold that none of the three articles falls within sub-section (1) of S. 4 of the Act, accept this petition and set aside the order of the Provincial Government under sub-section (3) of S. 7 of the Act. I make no order as to costs.

[12] Since writing this, I have seen the judgment of my brother Achhru Ram in which he

has referred to some other matter appearing on the pages of the Nawa-i-Waqat containing the objectionable articles and consider it my duty to record that there was no application before us by the Advocate General to treat this matter as evidence under S. 26 and no reference to this matter was made by either party in the course of arguments before us and I do not consider we are justified in drawing inferences from such matter without giving an opportunity to the petitioner to be heard.

[13] I confess I do not follow how my learned brother deduces from my judgment the proposition that a leader of a community who by reason of his personal character, or the catholicity of his views, is respected also by a large number of persons not belonging to that community, may be attacked and insulted with impunity, but not a narrow-minded bigot whose vision is thoroughly clouded by communalism of the most rabid type and who, therefore, commands no respect, and is even loathed, by persons not belonging to his community. It is quite clear from my judgment that if the "narrow-minded bigot" be a person who is the founder of a religion, an attack on him, subject to the other conditions, will bring the person who attacks him within the statute but if such person is merely the leader of a political party, however communal the creed of that party may be, he will stand on the same footing as any other political leader, whatever his personal character and however catholic his views. And, as I have taken care to point out, this position does not change if the political party that he leads claims to include or does include members belonging to other communities and even if he is accused of communalism or partiality to his own community in his politics.

[14] **Achhru Ram J.** — "Nawa-i-Waqat" is an Urdu Daily published from Lahore. It started publication about the end of June or beginning of July 1944, a declaration under S. 5, Press and Registration of Books Act, 30 of 1867, having been filed on 26th June 1944 by M. Abdul Hamid, petitioner. From the contents of three cuttings from three issues, bearing dates 10th, 12th and 13th September 1946, of the paper produced by the petitioner, an inference may reasonably be drawn that it professes to be an exponent of Muslim opinion and to espouse the cause of the Muslim community generally and therefore naturally enjoys some amount of patronage at the hands of a section at least of that community.

[15] On 7th October 1946, a notice was served on the publisher of this journal under sub-s. (3) of S. 7, Press (Emergency Powers) Act 23 of 1931 calling upon him to de-

posit with the District Magistrate, Lahore District, on or before 19th October 1946, security in the amount of Rs. 3000, it being stated that the action had been taken by reason of three articles published in certain issues of the Nawa-i-Waqat. The three articles are reproduced in extenso in the judgment which my learned brother Munir proposes to deliver. Mian Abdul Hamid has moved this Court under S. 23 of the aforesaid Act alleging that none of the articles in question contains any words, etc., of the nature described in sub-s. (1) of S. 4, that, under the circumstances, no notice under sub-s. (3) of S. 7 could be issued to him, and that the notice was accordingly illegal and should be set aside.

[16] In respect of the article published under the caption "*Sabar aur zabt se kam lijiye*" in the issue dated 12th September 1946 and marked as Ex. C, I am in respectful agreement with the view taken by my learned brother and have no hesitation in holding that the same does not offend against the provisions of any of the clauses in S. 4 (1) of the Act, and could not, therefore, justify the action taken by the Provincial Government.

[17] In respect of the other two articles, however, after giving my most careful consideration to the matter and to the reasons given by my learned brother in support of his view, with the utmost respect, I feel constrained to come to a different conclusion and hold that the said articles do fall within the purview of cl. (b) of sub-s. (1) of S. 4 and therefore the notice issued by the Provincial Government to the petitioner under S. 7 (3) cannot be held to be illegal.

[18] Section 7 (3) of the Act empowers the Provincial Government, to require, by notice in writing, the publisher of a newspaper, published within its territories, which contains any words, signs, or visible representations of the nature described in S. 4, sub-s. (1), stating or describing such words, signs or visible representations, to deposit with the Magistrate within whose jurisdiction the newspaper is published, security to such an amount, not being less than five hundred or more than three thousand rupees, as it may deem fit, where security in respect of that newspaper under the provisions of the Act had not been required, or, having been acquired, had been refunded under sub-s. (2). In order to fall within the purview of cl. (b) of S. 4, sub-s. (1), the words, signs or visible representations must tend directly or indirectly to promote feelings of enmity or hatred between different classes of His Majesty's subjects.

[19] In the article headed "look at the high-handedness of those short-sleeved persons" appearing in the issue of 10th September 1946, and marked as Ex. B very abusive language has

been used in respect of Mr. Gandhi. As pointed out by my learned brother, the central idea of the article is that Mr. Gandhi though he professes to be a saint and lover of the truth is in fact a causist, a hypocrite and a liar. I am of the opinion that this foul abuse of Mr. Gandhi, who is held in very high esteem by the Hindu community generally, in respect of certain activities which he is said to have indulged in for the benefit and in the interests of Hindus to the detriment of the Muslim community does tend to promote feelings of enmity and hatred between the two communities. I am further of the opinion that the statement as to the Hindus having started disturbances at Calcutta, Bombay and Allahabad and the insinuation as to their having been the aggressors in committing acts of violence on the Muslims also tends to have a similar effect.

[20] Although, on the view that I am inclined to take about the implications of these articles, I do not consider that it is necessary, in this case, to enter into any lengthy discussion of the question whether political parties can, under any circumstances, be regarded as different classes of His Majesty's subjects within the meaning of cl. (b). I, with all respect, feel bound to express my inability to subscribe to the very wide proposition enunciated by my learned brother that such parties can, under no circumstances, be regarded as such classes. The word "classes" has not been defined in the Act or in the Penal Code in which S. 153A makes it a criminal offence for any one by words either spoken or written, or by signs, or by visible representations, to promote or to attempt to promote, feelings of enmity or hatred between different classes of His Majesty's subjects. In cases arising under S. 153A, the word "class" has generally been held to include any well-defined group of His Majesty's subjects: *vide* 3 Lah. 405,⁷ 57 Bom. 253⁸ and A. I. R. 1941 Oudh 33.⁹ In A. I. R. 1940 Bom. 379,¹⁰ Beaumont C. J. and Wassoodew J. added a proviso to the effect that to bring any definite group or body of persons within the description of a class of His Majesty's subjects within the meaning of the aforesaid section, the body or group must possess a certain degree of importance numerically, Wassoodew J. being also of the view that the group or collection of individuals alleged to be a class should bear a common and exclusive designation and possess common and exclusive characteristics. The same idea was expressed in a different language in the majority judgment in A. I. R. 1934 Lah. 219¹¹ (where the police force as a whole was held to be a "class" within the meaning of the section), by saying that the word "class" as used in the section connoted a separate portion of the popu-

lation of the country, consisting of a number of persons possessing common attributes grouped together under one common name. If a well-defined group or collection of persons, of sufficient importance numerically, bearing one common and exclusive name, is bound together by common attributes or characteristics, I do not see any reason, on principle, why it cannot be regarded as a class within the meaning of S. 153A, Penal Code, or S. 4 (1), Press (Emergency Powers) Act and why feelings of enmity or hatred between two such groups can be promoted or attempted to be promoted with impunity, merely because the common attributes or characteristics which bind them together consist of their respective political programmes and ideologies, particularly when those programmes and ideologies are diametrically opposed to each other and have been pursued by the groups with such vigour that they have come to be regarded, and to regard themselves, as two absolutely hostile and wholly irreconcilable groups. Both the provisions of the law mentioned above are meant for preserving the public peace, and I can see no reasonable ground at all for assuming that the legislature intended to hit promoting or attempting to promote feelings of hatred or enmity between those groups or bodies of persons only which were bound together by common religious, racial, social, tribal, economic or functional attributes (my learned brother is prepared to extend the definition of "classes" to all such groups), but had no intention of preventing such feelings being promoted or attempted to be promoted between groups, however, great their importance numerically and, however sharp the line dividing them from each other, where each of them is bound together only by common attributes consisting of a common political programme or ideology; although the need for preventing such feelings being promoted between them may be the greatest. If in A. I. R. 1941 Oudh 33,⁹ the talucdars and zamindars of Oudh and the tenants could be held to be two different classes, merely because of the common economic characteristics that bound them together, in spite of either group having, within its fold, persons professing the same religious faith, and belonging to the same race; and if in A. I. R. 1934 Lah. 219,¹¹ the police force, comprising, within its ranks, Hindus, Mohammadans, Sikhs, Christians, Parsis, Anglo-Indians, Indians and Europeans, could be held to be a class as compared with the public also comprising persons belonging to the same communities, castes or creeds, I cannot understand why the Congress and the Muslim League cannot be regarded as two different classes within the meaning of the afore-

said provisions of the law, merely because the Congress has, within its fold, a certain number of Muslims, and the Muslim League, although consisting exclusively of Muslims and although commanding the allegiance of a very substantial majority of the Indian Muslims, has not got all the Muslims within its ranks. Both are well-defined bodies of persons, each amply possessing the requisite qualification of numerical importance. Both have a common and exclusive name and both have common and exclusive attributes, very sharply and almost irreconcilably dividing one from the other. They are known to the world at large as two most hostile groups, all efforts to bridge the gulf between whom have miserably failed and have, if anything, only made the gulf wider still. One of the groups stands for a United India while the other is irretrievably wedded to the partition of India, and both declare that there can be no compromise on this issue, each blaming the intransigence of the other for its failure to achieve its objective. There is no place in one group for any one subscribing to the political creed of the other, just as there is no place in the Muslim religion for anyone accepting the religious creed of the Hindus and *vice versa*. The political creed of either of the two groups, the Congress and the Muslim League, is, thus, the common and exclusive attribute of that group just as the religious creeds respectively of any two religious groups are their respective common and exclusive attributes. I refuse to believe that the intention of the legislature was that the divergent creeds of the latter should make them two different classes of His Majesty's subjects within the meaning of S. 153A, Penal Code and S. 4 (1), Press (Emergency Powers) Act, but not the divergent creeds of the former. I see no distinction in principle at all between the two sets of cases. It may be that political parties in countries with settled constitutions, the difference between whom generally is one of policy only, and each of which seeks to get the control of the Governmental machinery by trying to win over the majority of one common electorate to its side, would not be regarded as two different classes within the meaning of any statute containing provisions similar to those contained in the two Indian Acts mentioned above. There is, however, no analogy at all between such political parties and political parties like the Congress and the Muslim League in India each of which is trying to force the other to accept its own views on the constitutional question, which has yet to be settled, not by an appeal to a common electorate, which does not exist, but by other means, not always altogether peaceful, and, occasionally at least including threats of

violence. It would be dangerous, and at the present moment when the atmosphere is so much surcharged, disastrous, if the members of these two bodies could with impunity, indulge in the use of language calculated to promote feelings of enmity or hatred between the two bodies, their acts being within the reach neither of S. 153 A, Penal Code, nor of S. 4 (1), Press (Emergency Powers) Act, which result will inevitably follow if my learned brother's view as to the total exclusion of political parties or groups regardless altogether of their numbers, composition and other attributes, from the purview of the word "classes" is accepted. There are no *a priori* reasons for taking such a view and there is nothing, either in the language or in the language of the statute, or in the decided cases in which the question as to the interpretation to be placed on the word "classes" as used therein arose, to justify it.

[21] After giving the matter my very careful consideration, I am of the opinion that where in any given case the question arises whether two political parties can be regarded as two different classes of His Majesty's subjects within the meaning of S. 153 A, Penal Code or S. 4 (1), Press (Emergency Powers) Act, it has to be decided not on any *a priori* grounds, but, like all other cases in which a similar question arises, on a consideration of the numerical importance of each party and the common attributes or characteristics binding its members together; and if, on such consideration, they are found to fulfil the tests mentioned above, i. e., possess sufficient importance numerically and are bound together by common and *exclusive* attributes, there can be no reason not to hold them to be such classes. Approaching the consideration of the case from this point of view, I have no hesitation in holding that, at the time the Articles in question were published, the Congress and the Muslim League were such classes. Accordingly, even if, as my learned brother holds, Mr. Gandhi cannot be regarded as a leader of the Hindus, religious or otherwise, he, without doubt, is, and has for long time been, the topmost leader of the Congress. The foul and filthy abuse of him indulged in by the writer of the Article in question could not but cause very deep and bitter resentment amongst the members of the Congress and tend to create feelings of enmity or hatred between two classes of His Majesty's subjects, *viz.*, the Congress and the Muslim League.

[22] In coming to the above conclusion, I have not been unmindful of the fact that, during the course of his arguments at the hearing of the petition, the learned Advocate General admitted that a political party could not be

regarded as a "class" within the meaning of the statute. I am inclined to think that in making this admission he had in his mind only the political parties as generally existing in the self-governing countries and did not consider the special features of political parties in India like the Congress and the Muslim League, as they now exist. Be that as it may, any admission by the learned Advocate-General on a question of law cannot bind the Crown nor can it stand in our way of deciding the case according to our view of the law.

[23] Assuming that the Congress and the Muslim League cannot be regarded as different classes of His Majesty's subjects within the meaning of S. 4 (1), I am of the opinion that the vituperative attack on Mr. Gandhi had a tendency to promote feelings of hatred and enmity between the Hindu and the Muhammadan communities generally. It is true, as pointed out by my learned brother that Mr. Gandhi is not a founder of the Hindu religion. I, however, find myself unable to endorse his view that he is not even entitled to be regarded as a leader of the Hindus. I have no recollection if the learned Advocate General in fact conceded that he was not such a learned leader nor have I been able to discover anything to that effect in the very copious notes of the arguments that I took. However, it may be that either my memory is failing me or I missed the point at the time of arguments, for my learned brother seems to be definite that such an admission was made by the learned Advocate General. If the latter did make such an admission, all I have to say is that it was a wrong admission and completely disregarded facts unquestionable and unimpeachable in their nature. To an average Hindu, Mr. Gandhi is much more than a mere politician; in fact in his eyes his role as politician is a secondary one, his primary role being that of a Mahatma, i. e., one who has attained the highest degree of spiritual eminence. It is undeniable that a large section of the Hindu community look up to him for guidance in matters religious and spiritual. In the book edited by Sir Radhakrishnan for being presented to him on the occasion of his seventieth birthday there is an article by a well-known and eminent Hindu (to which I propose to refer in greater detail a little later) wherein he has been described as a great prophet of Hinduism. Although he has never undertaken the task of preaching or propagating the doctrine of the Hindu religion as a dogmatist, he is generally believed by the Hindus as the greatest living person who has translated in his own life the principle of the Hindu religion. It is almost entirely due to his preachings that the

condition of the so-called untouchables has undergone so much amelioration and the doors of a large number of Hindu places of worship have been thrown open to them. It was entirely due to the stand taken by him that millions of the so-called untouchables were allowed to remain within the fold of the Hindu community for the purposes of franchise. If with all this Mr. Gandhi cannot be regarded as a leader of the Hindus I cannot see how any other living Hindu can aspire to that position. It is wholly immaterial that he himself has never claimed to be a leader of the Hindus. He in fact has never claimed to be a leader at all, not even of the Congress or of any political party. The question is not what he claims to be but how he is regarded by the community itself. The mere circumstance that in the political field his following includes a fairly large number of persons belonging to other communities, while quite a number of the Hindus do not subscribe to his political views, cannot be allowed to detract from his position as a leader of the Hindus in religious, spiritual and social matters.

[24] Be that as it may, whether Mr. Gandhi is or is not entitled technically to be called a leader of the Hindus, nobody can question the fact that he is regarded as a very highly honoured member of the community by almost every Hindu whether or not he shares his political opinions.

[25] In order to invoke the application of the relevant provisions of the statute, the attack need not necessarily be directed against one who is either the founder or a leader of some religious or social group which can be regarded as a class within the meaning of the statute. For a variety of causes, an attack on an individual member of such a class may be looked upon by that class, or a sufficiently large section of that class, as an affront to, or as a manifestation of hatred or hostility towards the class rather than towards the individual. Such a result may follow from the position occupied by the person attacked in the class, the nature of the activities in respect of which he is attacked, the object of or the motive for the attack, the language employed, and the state of feelings existing between the two classes at the moment. In certain circumstances the attack even on an ordinary member of a certain class by some one belonging to another class may cause very great resentment amongst the members of the former class generally. This may happen particularly when there is unusual tension or bitterness existing between the two classes and the members of the former class have reason to believe that the attack has been made on the particular member of their class by reason of something supposed to have been done or undertaken by him for the benefit of the class.

[26] Hindu community is something much wider than the Hindu religion and includes within its fold large sections of persons who do not subscribe to the tenets of the Hindu faith, for example, Brahma Samajists, Jains, Atheists. Whether Mr. Gandhi can or cannot be regarded as a religious leader of the Hindus, he is certainly looked upon by a very large majority of the members of the Hindu community as one of the most honoured, if indeed not the most honoured Hindu and is regarded as one of the greatest benefactors of the community in recent times. These feelings are not confined only to those Hindus who share his political opinions. Even those who not only do not subscribe to those opinions, but regard them as positively harmful to the political interests of the community, do not yield to his political followers in their respect and veneration for his personality and character. It cannot be denied that at the time the article in question was published, tension between the Hindu and the Muslim communities generally had reached its peak. It is again quite clear from the language used in the article that the attack on Mr. Gandhi was directed against what the writer believed to be his activities for and on behalf of the Hindu community. In the passage beginning at line 15 on page 5 of the printed record he is by necessary implication referred to as a leader of the Hindus because the persons who were believed by the writer to be the aggressors in the disturbances at Calcutta, Bombay and Allahabad are described as his followers. Nobody has so far suggested—certainly that is not the suggestion of the writer of the Article—that the disturbances were started at any of these places by the non-Hindu followers of Mr. Gandhi or that they were otherwise than merely communal riots between Hindus and Muslims. Under the circumstances, it cannot be reasonably denied that the tirade against Mr. Gandhi's character contained in the Article was likely to arouse feelings of utmost anger and resentment generally amongst the Hindus to whose notice it might come, regardless of their political opinions. It is wholly immaterial that Mr. Gandhi has got many followers, and many more admirers, outside the Hindu community who also might have resented the foul abuse contained in the article. The resentment felt by those who are referred to in the article itself as the followers of Mr. Gandhi would be essentially of a different kind from, and more intense than, that felt by his non-Hindu followers and admirers. Even if there could be no difference, either of kind or of degree, between the feelings aroused by this article in their minds, I see no warrant at all for the proposition that a writing can be taken outside the scope of the statute

merely because the bitterness and the resentment caused by it, which may reasonably be regarded as tending to excite feelings of hatred or enmity amongst the members of one class against another, may also be shared by some persons not belonging to, or within the fold of, the former class. To hold otherwise will imply that a leader of a community who, by reason of his personal character, or the catholicity of his views, is respected also by a large number of persons not belonging to that community, may be attacked and insulted with impunity, but not a narrow-minded bigot whose vision is thoroughly clouded by communalism of the most rabid type and who, therefore, commands no respect, and is even loathed, by persons not belonging to his community.

[27] The next question is whether the use of foul and abusive language in respect of Mr. Gandhi and the virulent attack on his character contained in the article in question can be held to tend to create feelings of enmity or hatred between either the Congress and the Muslim League or the Hindu and the Muslim communities, when the author of the article is a single individual who does not even profess to write in a representative capacity. In dealing with the subject my learned brother has expressed the opinion that merely hurting of feelings or susceptibilities of a class is plainly insufficient unless such feelings are hurt by another class or by some one acting on behalf of that class, or unless the class whose feelings are hurt reasonably hold the other class responsible for the offence. With very great respect, I feel constrained to confess my inability to accept the concluding clause of this proposition with all its apparent implications. According to it, in order to attract the application of the statute it has always to be proved, and the Court has to find, that the community whose feelings are hurt has reasonable ground for holding the other community to be in fact responsible for the offensive writing. In my opinion, all that the Court is required to see is whether, under the circumstances of the case, the offended community might not in fact hold the other community responsible apart altogether from the question whether it would be justified in doing so. What has to be taken into consideration is the probable mental attitude of the offended community and not whether there was justification or not for that community having that mental attitude. In deciding whether the offended class might regard the offending community responsible for the mischief, or otherwise entertain feelings of enmity and hatred towards that community in consequence of the offence given to it, all the attendant circumstances will have to be taken

into consideration. The strongest case will of course be where the offending act is actually or avowedly done in a representative capacity. There may, however, be other circumstances which may entitle the Court to hold that the offending act tended to promote feelings of enmity and hatred between the two communities. It may, for example, be that by reason of the position occupied by the author of the wrong in his own community, the other community might, in the ordinary course of things, ascribe it to the author's community generally; or it may be that, by reason of the wrongful act having been done, to all appearances, in furtherance of the interests of the community generally, the reaction in the minds of the members of the offended community might not be confined to the author of the wrong alone and might involve his community generally. It may again be that the feelings existing at the particular moment between the two communities are of such a nature, and there is so much tension between them, that the members of one community are quite ready to ascribe the responsibility for even individual acts of the members of the hostile community to the community generally and to suspect general conspiracy or design in the members of the hostile community to commit or promote wrongful acts like the one complained of.

[28] In A.I.R. 1927 Lah 590,¹² Dalip Singh J. did not take the view that the scurrilous and vituperative attack on the founder of the Mohamadan religion did not fall within the purview of S. 153A, Penal Code, by reason of the attack being by an individual. His Lordship's decision as to the inapplicability of S. 153A to the case proceeded on the ground that the section was intended to prevent persons from making attacks on a particular community as it existed at the time and was not meant to stop polemics against deceased religious leaders, however scurrilous and in bad taste such attacks might be. From the words used by the learned Judge in dealing with the matter, it is quite clear that, had the attack been not on the deceased founder of the Mohamadan religion, but on the Muslim community as it existed at the time, he would have had no difficulty in upholding the conviction of Raj Paul under S. 153A, Penal Code, although there was nothing to show that he wrote the offending book not in his individual capacity but as representing his community. It is true that in A.I.R. 1927 Lah. 594¹ evidence had been led to show that, at a meeting held to condemn the offending article, although the resolution passed condemned only the writer of the article, and made no reference to the Arya Samaj or Hindu Sabha, yet the speeches delivered in support of

the resolution were directed against not only the writer and the editor, but also against those who were looked upon by the Mohammadans as being responsible for and as being behind the author of the attack. There are, however, other cases decided in this Court as well as elsewhere in which, although there was no indication at all as to the offending words having been prompted or instigated by any class or section of persons, or of its being otherwise than the individual work of the author or writer himself, in view of the nature of the writing or in view of the time at which, and the circumstances under which, it was published, it was assumed that the feelings of enmity or hatred that it would excite in the minds of the offended community or class would not be confined to the writer himself but would extend to the community or class to which he belonged. Reference may in this connexion be made to the judgment in 13 Lah. 152¹³ in which S. 99B, Criminal P. C. and S. 153A, Penal Code were held to be applicable to a book named "*Chaudw-in-ka Chand*" written by the petitioner, a Hindu, which contained offensive material against the Prophet and the Holy Qoran. There is no indication that Chamupati wrote the book otherwise than as an individual Hindu. In view of the tension existing between the Hindus and the Mohammadans in Lahore at the time the book was published it was held that the intention of the author was to promote or to attempt to promote, feelings of hatred between the two communities and the case fell within the mischief of S. 99B, Criminal P. C., read with S. 153A, Penal Code.

[29] In A.I.R. 1936 ALL. 314¹⁴ Sulaiman C. J. who wrote the principal judgment of the Full Bench made the following observations :

"Where the author uses language which shows malice and is bound to annoy the members of the community the origin of which he is going to trace, and uses remarks which apply to all the present members of that community so as to degrade them in the eyes of the other classes, he would, in my opinion, be promoting feelings of enmity or hatred between that community and the members of his own community who, he intends, should entertain a low and poor opinion of that community, and regard them as belonging to the low caste."

On a superficial reading, these observations of the learned Chief Justice of the Allahabad High Court may appear to be somewhat too wide. However, in my opinion, they do seem to furnish a useful rule of guidance in the generality of cases. When someone publishes a writing containing matter highly offensive to one community, the members of that community may reasonably assume that the writing is intended by him for consumption by the members of his own community, and may ordinarily be expected to be read by them, and that as a result it may be

expected that a fairly large section of the community for whose consumption the writing is intended will be persuaded to hold views similar to those expressed in the publication. The natural repercussions in the minds of the members of the offended community may, therefore, be that the writing complained of represents the views not only of the writer personally but of a fairly large section of the community to which he belongs. The position may of course be different where the views contained in the particular writing are shown to have been repudiated by the community generally or not to conform to the views that a large section of the community is known to hold.

[30] In writing the main judgment of the Full Bench in A.I.R. 1939 Lab. 81⁴ Bhide J. has taken practically the same view, as may be gathered from the following observations made by him:

"If a Muslim preaches that Hindus, being infidels, should be harassed or killed, or a Hindu preaches against Muslims in the same strain, the words themselves would certainly tend directly to promote feelings of enmity or hatred between Hindus and Muslims. Similarly, if a Muslim condemns the tenets of the Hindu religion or a Hindu denounces those of Islam in strong language, the words used may tend indirectly to produce the same effect."

[31] My own view is that in deciding whether the words used in a particular case, whether spoken or written, tend directly or indirectly to create feelings of hatred or enmity between two classes of His Majesty's subjects, or only tend to create feelings of bitterness and resentment in the minds of the members of one such class against the person responsible for uttering or writing these words individually, should be decided, in each case, having regard to the nature and the implications of the words used, the person who has used them, the occasion for the use, the state of feelings between the two classes at the material time and the manner of the publication of those words. Applying these tests, I have no doubt in my mind that the words in this article describing Mr. Gandhi as a causist, a hypocrite and a liar, whether he is regarded as the leader of the Congress, or as a leader, or even an honoured member of the Hindu community, have a clear tendency to promote feelings of hatred or enmity between the Congress and the Muslim League in the first case, and between the Hindus and the Muslims generally in the latter case, and not merely to engender such feelings against the writer alone.

[32] These epithets have been used in respect of a person whose position amongst his co-religionists generally is aptly summed up in the following quotations from an article under the heading "A great Prophet of Hinduism"

contributed by Professor D. S. Sarma, of Madras in the book edited by Sir S. Radhakrishnan as souvenir to be presented to Mr. Gandhi on the occasion of his seventieth birthday in October 1939, to which a reference has already been made by me. At p. 286 of the book we read:

"For Mahatma Gandhi, who is a true incarnation of Hindu spirituality and in the direct line of descent from the ancient Rishis, is re-interpreting its internal truths and applying them in a marvelously original manner to the conditions of the modern world."

At p. 287 the learned Professor goes on to say:

"And, above all, his method of religious approach to all political and social problems and his insistence on Truth and Non-Violence in every sphere of life and his recognition of the spiritual unity of all men even in the details of every-day life are aspects of Hinduism at its best. Moreover, by his ascetic habits, his fasts and penances and his life of renunciation, he has upheld the ancient Hindu ideals of Brahmacharya, Tapasya and Vairagya in the modern world in which there is so much to corrupt every sense. Thus both by precept and by example Mahatma Gandhi is pointing the way to a future of Hinduism which will be really worthy of its past. Undoubtedly he is one of the greatest creative personalities in the history of Hindu religion and his speeches and writings will form part of the sacred books of Hindus."

The violent and vituperative attack on the character of a person held in such high esteem by his co-religionists was made at a time when the feelings between the two communities—the Hindus and the Muslims were extremely strained—in fact they have never been known to have been so much strained in the past history of this Peninsula—and when either community was generally pre-disposed to place most uncharitable construction on anything said or done by any member of the other community, and to look for a communal background for, and discover a conspiracy or design behind, every individual act. The attack was published in an Urdu newspaper which at least professes, as its very name shows, to voice the feelings of a large section of the Muslims.

[33] Section 26, Press (Emergency Powers) Act, permits, in case of action taken against a newspaper, any copy of such newspaper published after the commencement of the Act being given in evidence in aid of the proof of the nature or tendency of the words, etc., contained in such newspaper, in respect of which the action has been taken. Although no other issues of Nawa-i-Waqat excepting one leaf from each of the three issues containing the three articles on the basis of which the order giving rise to these proceedings was passed, have been placed on the record, the contents of even the three leaves, which contain little else except articles of which the main burden is propaganda for the Muslim League, and reports of the activities of the League in different parts of the country as communicated by the office-bearers of the vari-

ous branches of the League, can leave no doubt in one's mind as to its enjoying some patronage at the hands of, and possessing some circulation amongst, that section at least of the Muslim community which owes allegiance to the Muslim League. Passages are, further, not wanting in the three cuttings in which an average Hindu may read veiled threats of violence and a desire to excite communal passions. For example, in one of the cuttings, an article appearing under the caption "The background of direct action" contains a statement to the effect that one drop of Muslim blood is dearer to the Qaid-i-Azam than the lives of all the hordes of non believers (which expression in the context can only be taken to refer to Hindus). In another article in the same cutting, professing to reproduce some of the sayings of Mr. Jinnah, it is stated that the historic sword of the Muslim had been used before and was going to be used now for purposes of self-defence. I do not for a moment mean to suggest that there is necessarily anything sinister in these statements. I am prepared to concede that the writers of the two articles meant nothing more than to indicate, in the one case, that the Indian Muslims would, if need be, use the sword but only in self-defence, and, in the other, that single drop of the blood of a Muslim was so dear to Mr. Jinnah that he would not allow anything to be done which might involve the risk of the blood of a single Muslim being shed. I, however, also feel that at the present moment, when bitterness between the two communities has reached such a high pitch, and when the communal atmosphere is so much surcharged with mutual suspicion that ordinarily no member of either community is willing to place a charitable construction on anything said or written by any member of the other community, most Hindu readers will construe the first statement as a threat of use of the sword for the achievement of their object by the Muslims, and the second statement as implying that one drop of Muslim blood shed by anyone belonging to the other community was to be avenged by effacement of hordes of the members of that community.

[34] Any Hindu reading the article forming the subject-matter of these proceedings with the background furnished by the above and similar other passages, and in their context, may reasonably be expected to assume that they were both intended and likely to influence the minds of the Muslim readers.

[35] The occasion for the attack as indicated in the article was an alleged exhortation by Mr. Gandhi to the Hindus to offer resistance to Muslims after strengthening themselves accompanied by the advice that they and the Muslims

should fight without either party taking help from the police and the military, and an assertion by him that the Muslims were the aggressors in starting disturbances, the Hindus only retaliating, and that Mr. Jinnah, the greatest leader of the Muslim community for the time being, was not on the right path.

[36] In view of all these circumstances, the re-action to the attack on Mr. Gandhi contained in this article in the minds of the Hindu readers might reasonably be expected to be one of hatred against the Muslim community which might be supposed to patronise and encourage such publications, and for whose consumption it was apparently written and published, and for the advancement of whose interests and for whose benefit the publication purports or professes, if not expressly at least by implication, to have been made.

[37] I am in complete agreement with my learned brother when he says that where the writer of an objectionable article does not represent a community and professes to speak merely for himself, the community to which the writer belongs cannot as such be held responsible for the action of the writer, and am prepared to accept this proposition even without the qualification sought to be introduced in it by my learned brother by the addition of the following words:

"When the attack if it had been by a member of the religious community to which the leader belongs could not have been said to produce class hatred."

In my view, however, the question whether in a given case the community to which the writer of an objectionable article belongs can or cannot be held responsible for the wrongful act of the writer is wholly foreign to the scope of the enquiry like the present, for the simple reason that the preventive or penal action giving rise to such an enquiry is not taken against the community and therefore, no question of the apportionment of the blame between the writer and his community arises. All that the Court has to decide in such a case is whether the class or community offended, under the circumstances of the particular case, may not react to the offensive publication by entertaining a feeling of hatred or enmity for the community to which the writer belongs, and, as I have attempted to show in an earlier part of my judgment, this it may do even though no responsibility for that publication or writing can in fact be fastened on that community.

[38] I must, however, express my respectful dissent from the proposition involved in the passage quoted above and intended by my learned brother to qualify the other proposition with which I have just now been dealing. With respect, I must confess my utter inability to discover

any connection at all between the two propositions. An attack on the leader of a religious community by a member of the same community cannot be held to create class hatred, and cannot therefore, attract the application of S. 4 (1), for the simple reason that in such a case there are no different classes between whom feelings of hatred or enmity could have been created, the community being regarded as one class. There is no analogy at all between such a case and a case where two different classes are in existence and the attack is by a member of one class on a leader of the other class. If in a given case a community had within itself two or more well defined classes bearing different names and possessing different common and exclusive attributes, an attack on a leader of one of these classes by a member of another class, though both belonged to the same community, might well fall within the purview of the statute as tending to create feelings of hatred between the two classes. Arya Samajists and Sanatanists in the Hindu community, Shias and Sunnis in the Muslim community, and the two rival sects amongst the Jain community are some of the examples of different classes within one community, promoting or attempting to promote feelings of enmity or hatred between whom have occasionally formed subject of proceedings under S. 153A.

[39] I have also, with regret and with the utmost deference to my learned brother, to express my inability to accept his argument that in view of the admission that if the publication in question had been by a Sikh or a Parsi, the tendency or the result would not have been class hatred, it should make no difference, in principle, now that the publication is by a Muslim. In my opinion, the answer to the question whether, in a given case, the attack by a Sikh or a Parsi on a Hindu leader of the eminence of Mr. Gandhi could be held to have a tendency to promote class hatred should depend on precisely the same considerations as have been mentioned above. At the present moment, there may be no tension between the Hindu and the Sikh and the Parsi communities generally and, therefore, any attack by a Sikh or a Parsi on a Hindu leader, or even on the Hindu religion, may be regarded as merely his individual act by the Hindu community which may, in view of the cordial relations generally existing at the moment between itself and the community of the offender, see no reason to feel any resentment against that community or any member thereof other than the person actually responsible for the attack, and the attack may, accordingly, not be deemed to have any tendency to promote class hatred. However, if per chance, at any

time tension and bitterness of the same intensity as that at present existing between the Hindu and the Muslim communities, should come to exist between the Hindus and the Sikhs or the Parsis, and any member of either of the latter two communities actively engaged in doing propaganda on behalf of his own community, indulges, purporting to act in furtherance of the community's interests, in a vituperative attack on the most beloved and respected leader of the former, such attack may produce, in the minds of the members of the offended community such a reaction as may have a tendency to create feelings of enmity or hatred against the community of the offender. In the same way, if by any chance the relations between the Hindu and the Muslim communities should improve and all traces of the present bitterness and tension should disappear, any attack by a Muslim journalist on Hindu leaders or even on the Hindu religion, would normally produce feelings of resentment only against that journalist and would not be deemed to have any tendency to promote feelings of hatred or enmity between the two communities.

[40] In case of an attack by a disgruntled member of a community on one of its leaders, there can be no question of the attack tending to promote feelings of enmity or hatred between two different classes of His Majesty's subjects, even where the attack is known not to be the individual act of the person ostensibly responsible for it, but to have been inspired or instigated by a large section of the members of the community holding similar views, unless, of course, the community has got divided into well-defined sections, each of sufficient importance numerically and possessing other attributes required to make them "different classes of His Majesty's subjects" within the meaning of the statute. It is conceded by my learned brother that in cases where an objectionable publication by a Hindu or a Muslim is shown to have been inspired or instigated by the writer's or the publisher's community, or by a fairly large section of such community, the publication may be held to fall within the mischief of S. 4 (1) as having a tendency to promote feelings of class hatred. It is obvious, therefore, that an attack on the leader of a community by a member of a hostile community cannot, in any circumstances, be placed on the same footing as an attack on the same leader by one or more members of his own community for determining the question of the applicability of S. 4 (1).

[41] The alternative argument of the learned counsel for the petitioner was, and that argument has found favour with my learned brother, that, in any case, the impugned publication

falls within the purview of Explan. 4 to S. 4, and is, on that account, immune from action under S. 7 (3), or under S. 7 of the Act. I regret to have to say that even on this point I am unable to see eye to eye with my learned brother. The Explanation reads as follows:

"Words pointing out, without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects shall not be deemed to be words of the nature described in cl. (h) of this sub-section."

After giving my most careful thought to the matter, I find myself unable to accept the contention of Mr. Mohammad Amin Khan as to the applicability of this Explanation to the facts of the present case. The absence of malicious intention and an honest desire for the removal of matters which are producing or have a tendency to produce feelings of enmity or hatred between the two classes is of the very essence of this Explanation. In the present case, the writer of the impugned article cannot by any stretch of imagination claim credit for the absence of a malicious intention and for possession of an honest desire such as is contemplated by the Explanation. Even assuming Mr. Gandhi to have actually used the words that have been put into his mouth in this article the comments made by the writer clearly betray an intention on his part to distort the words used and to misrepresent the intention and the object of the person using them. One of the directions which Mr. Gandhi is supposed to have given to his followers is stated in the article as follows:

"If there be disturbances, the public in general should not take help from the police and the military. If, at all the Hindus and Muslims have to fight, they should fight like brave men."

According to the writer of the article, in the language of ordinary human beings this direction of Mr. Gandhi was to be interpreted as below:

"One should not depend upon the help of the police and the military. The Hindus should offer resistance after strengthening themselves. They and the Muslims should fight with one another without taking help from the police and the military. The Government should not call the police and the military."

It scarcely requires an argument to show that a deliberate attempt has been made in the above quoted passage to distort the meaning of the words Mr. Gandhi is alleged to have used. In the words put into the mouth of Mr. Gandhi there was nothing at all said as to the Hindus strengthening themselves or offering any resistance. According to the words put into his mouth what Mr. Gandhi said was that if the Hindus and the Muslims must needs fight they should fight like brave men. No exception could be taken to this statement by any reasonable man. The writer of the article omitted the words "If, at all" and "have to fight" and made

Mr. Gandhi appear to say something quite different. I cannot but regard this as a deliberate and dishonest attempt to misrepresent Mr. Gandhi in order to show that he had abjured his life long teaching of non-violence and had actually begun to preach violence, and feel bound to hold that the present case is not governed by the Explanation.

[42] In this connection, it is interesting to observe that Mr. Mohammad Amin Khan, the learned counsel for the petitioner, during the course of his address, read to us passage from a certain issue of the Hindustan Times which, according to him, was the source from which the writer of the impugned article derived his information as to the statements Mr. Gandhi was, in the aforesaid article, alleged to have made, and in which Mr. Gandhi was reported to have said, in one of his post-prayer speeches, that communal harmony like the repeal of Salt Tax could not be had in a day, that Ministers would have to live and die for it, that Hindus and Muslims should not take the help of the police and military, that if they must fight they should fight like brave men, and that if the help of British arms was taken there could be no freedom for India. Mr. Mohammad Amin Khan did not, however, choose to place the particular issue of the Hindustan Times on the record presumably because he must have realized, after reading the report of Mr. Gandhi's speech therein, that even the words put into his mouth by the writer of the article could not be said to be a faithful and honest representation of what had actually been said by him, much less could they lend any colour to the writer's own rendering and exposition of the speaker's utterances.

[43] For the reasons given above, I am definitely of the opinion that the scurrilous attack on Mr. Gandhi in the article in question does tend to promote feelings of enmity and hatred between the two classes of His Majesty's subjects, namely, Hindus and Mohammadans and that it is not possible to bring the case within the four corners of Explan. 4 to S. 4 of the Act.

[44] I am further of the opinion that the statement in the aforesaid article that Mr. Gandhi, in spite of his pretensions as a champion of the creed of non-violence, has been urging the Hindus to strengthen themselves in order to fight the Muslims and had been egging them on to fight, itself also tends indirectly at least, to promote similar feelings between the two communities, because the members of the Muslim community, on reading a statement like this, would naturally have reason to expect acts of violence against themselves from the opposite community, being well aware of the weight which Mr. Gandhi's words usually carry with

an average member of that community, and it cannot be gainsaid that their natural re-action towards that community, would be or at least might be one of enmity or hatred.

[45] The assertion in the article above referred to as to the Hindus having started disturbances at Calcutta, Bombay and Allahabad and the following statement contained in the third article forming the subject-matter of the notice issued to the petitioner and printed at p. 7 of the printed record,

"Although it had become an admitted fact that the trouble in Calcutta was started by the Congressites and theirs' was the blackest record of oppression and barbarity also. The Hindu Sabhaite Press of Lahore incited the Hindus against Muslims. In Bombay too, the Muslims became the target of cruelty and oppression. The Hindu-Congressites acting under an organized scheme of violence made the Muslims the target of oppression. Mr. Kher's Hindu Police also oppressed the Muslims only. This oppression is still going on."

may be dealt with together.

[46] I would straightway admit that, except for the passage quoted above, the third article does not appear to me to fall within the purview of the statute under which action has been taken against the petitioner. I am, however, of opinion that the above quoted passage as well as the above mentioned statement appearing in Art. 2 do fall within the mischief of the statute.

[47] It is true that the third article purports to have been written with the avowed object of refuting certain comments said to have appeared in the Hindu Press regarding certain incidents at Jullundur and the above-quoted passage, on the face of it, was intended merely as an argument in support of the position taken up by the writer as to the Hindus, and not the Muslims, having been aggressors at all places where the disturbances had broken out. There can, however, be no doubt at all that, regardless altogether of the intention and object of the writer, the statements made and the language used could not but have a tendency to create feelings of hatred and enmity in the minds of the Muslims against Hindus on account of the acts of cruelty, oppression and organised violence said to have been committed by them on members of the Muslim community. As observed by a Full Bench of this Court in 12 Lah. 345,¹⁵ even a single sentence, if obnoxious to sub-s. (1) of S. 4 of the Act, may justify action under the said Act.

[48] If the words actually used by the writer had the tendency contemplated by S. 4 it can be no defence to proceedings under the Act that the writer did not intend to promote feelings of ill-will or enmity between the two classes of His Majesty's subjects. Unlike S. 153A, Penal Code, under the aforesaid section the intention of the author of the offending words is wholly immate-

rial and irrelevant except, of course in a case where he seeks to bring his case within the purview of Expln. 4 to the section. I am aware that in the judgment, A. I. R. 1939 Lah. 81⁴ a contrary view was taken, but, after giving my very careful thought to the reasons given by Bhide J., who wrote the main judgment, in support of that view, I with the utmost respect to the learned Judges constituting the Bench, find myself unable to agree with it.

[49] The Press (Emergency Powers) Act is more in the nature of a preventive than a penal Act. It was enacted avowedly for the purpose of providing for emergencies which could not be met by the ordinary law of the land. While under S. 153A, Penal Code, and the other cognate provisions of the law, mere tendency to create class-hatred had not been considered to be enough, and the person responsible for the objectionable speech or writing had to be shown to have intended to create such hatred, the aforesaid Act, for reasons best known to the Legislature, was directed against words, etc., having direct or indirect tendency to create hatred between different classes of His Majesty's subjects.

[50] In A. I. R. 1939 Lah. 81⁴ the Bench took the view that the publication of mere words having the tendency to promote class-hatred, apart from any question of intention of the speaker or writer was not sufficient for the purpose of attracting the application of S. 4 of the Act. Action in that case had been taken by the Provincial Government in respect of a news item appearing in a certain issue of a daily paper named, the 'Vir Bharat' relating to a Hindu-Muslim riot in which certain acts of aggression were alleged to have been committed by the Muslims against the Hindus. The language used was found to be temperate and inoffensive and the authenticity or the good faith of the report was not challenged. It was held that S. 4 of the Act could not be invoked merely on account of the apparent tendency of the words used, any intention on the part of the writer to create class-hatred being excluded by the consideration that he had not used objectionable and offensive language and that the authenticity or the good faith of his report had not been challenged. The first ground given by Bhide J. for holding that S. 4 could not apply, unless the writer was shown to have had an intention to promote class-hatred, was that in a statement of a description that had to be dealt with in that case it was really not the words themselves that were mischievous or had any tendency to promote feelings of enmity or hatred, but that it was the incident that had occurred that was likely to be resented, and might, therefore, be said to have such a tendency. I must say, with all respect,

that this reasoning of the learned Judge does not appeal to me. If a report with regard to the incident had not been published in the newspaper the members of the community against whom acts of aggression had been committed, living in other places, might never have come to know of them and there might thus be no occasion for them to resent those acts or to re-act to them by entertaining feelings of hatred or enmity towards the aggressor community. What can really be said to be the immediate cause of the resentment felt by the members of the community living at other places, and for their entertaining feelings of enmity and hatred against the other community, is the very report of the incident appearing in the press. It was certainly beyond the power of the Legislature to prevent mischief likely to be caused by the mere occurrence of a certain incident but it was within its power to prevent mischief being caused by the publication of news about the incident, whether authentic or otherwise, and, in my opinion, it has effectively done it by enacting ss. 3 and 4 of the Act. As has been pointed out in a number of decided cases, truth of the words used is no defence at all to an action under the Act and may in the generality of cases aggravate the offence by reason of its tendency to do more mischief. The publication of all matters that may tend to create class-hatred and thus may result in the disturbance of the public peace, regardless of their authenticity or otherwise, was intended by the Legislature to be made illegal and I have no doubt in my mind that the words used by the Legislature amply give effect to its intention.

[51] The second ground given by Bhide J., in support of his view is based on the language of Expl. 4 to S. 4, which has been quoted *in extenso* in an earlier part of this judgment. With respect, I find myself unable to accept his Lordship's interpretation of the aforesaid explanation. The explanation simply makes an exception in favour of a person who does an otherwise objectionable act honestly, with a lawful object, and without any malicious intention. It does not at all imply that the substantive part of the section is not applicable unless a malicious or dishonest intention can be attributed to the doer of the act.

[52] Reliance is next placed by his Lordship on the provisions contained in S. 26 of the Act allowing evidence to be given of copies of the newspaper concerned published after the commencement of the Act in aid of the proof of the nature or tendency of the words in question. I for one fail to see how there is anything in S. 26 which can possibly be taken to support the view taken by his Lordship. All that the section does is to make the matter appearing in other issues of the same paper relevant for the

purpose of determining the nature or the tendency of the words used on a particular occasion.

[53] A Full Bench of the Rangoon High Court in 13 Rang. 98¹⁶ in dealing with the question whether the motive or the intention of the person against whom an order under the Act has been made is or is not relevant has made the following observations at p. 100 of the report :

"The motive or intention of the person against whom the order has been passed would appear to be *nihil ad ram*, except in cases which fall within Expl. 4 of S. 4 of the Act. What has to be considered is the effect likely to be produced upon persons who may be expected to read the passages in question, and for that purpose not only ought the article to be read as a whole, but under S. 26 of the Act it is permissible for the Court to have regard to what is contained in other issues of the same publication with a view to ascertaining what would be the probable effect of the offending passages upon those persons who normally would see the articles that are published in the newspaper."

[54] In 20 Luck. 235¹⁷ a Full Bench of the Chief Court of Oudh made the following observations on the same subject at p. 243 of the report :

"The learned counsel for the applicant contends that his client is an innocent printer of the two documents in the ordinary course of business, and he carried out the work in the *bona fide* belief that there was no infringement of S. 4, sub-s. (1). We are not called upon in these proceedings to pronounce on the intention which underlay the action of the applicant or the question whether the action was actuated by any malice or knowledge that the publication would offend against the provisions of S. 4, sub-s. (1). As we have mentioned above the powers of the Court are of a limited character and we are called upon only to determine whether the words in the publication did or did not tend directly or indirectly to bring into hatred or contempt the Government or any section of the people or to promote feelings of enmity between the subjects. The intention of the printer is, we consider, foreign to such inquiry."

[55] If I am right in my view of the interpretation to be placed on the relevant provisions of the statute and in holding that the question of the intention of the writer is wholly irrelevant, there seems to be no escape from the conclusion that the two passages mentioned above have the tendency mentioned in cl. (b) of the first subsection of S. 4, Press (Emergency Powers) Act, and therefore, action was rightly taken by the Provincial Government against the petitioner under the said Act.

[56] I do not see at all how, if according to the plain language of the statute, any publication, having a tendency, direct or indirect, to create feelings of enmity or hatred between two classes of His Majesty's subjects is hit by it, irrespective altogether of the intention of the person immediately responsible for such publication, the publications in question can legitimately be taken outside its scope, even if the assertions contained in them about the Hindus being the aggressors in the recent communal disturbances in the several places is assumed to be true in their entirety. I am prepared to

accept the view of my learned brother that there is no distinction in principle between the publication of a news-item as such, and its incorporation in a journalistic comment as an argument in support of some proposition adumbrated therein, and that if, in the former case, it does not fall within the purview of cl. (h) of S. 4 (1), there can be no reasonable ground for holding that it does in the latter case, except, of course where the comment itself is otherwise hit by the aforesaid clause. I, however, with all respect, am not prepared to accept the proposition that the publication of a news-item, even though its authenticity is not questioned, can never attract the application of the statute. At times the mere publication of the news about a certain incident may be calculated to inflame communal passions throughout the length and the breadth of the country or the province, and to lead to most disastrous results. The very truth of the incident may have the effect of further aggravating the situation. Can it be said that the publication of such news will not tend to promote feelings of communal hatred? It should be impossible to answer this question in the negative unless one can hold that like S. 153A, Penal Code, S. 4 (1), cl. (h) of the Act applies only where it is proved that the publication was made with intent to create such feelings. In A. I. R. 1939 Lah. 81⁴ the *ratio decidendi* was not that the publication of a news-item was exempt from the operation of the statute on any *a priori* grounds, but that there was nothing to show any intention to promote class-hatred by such publication. Once it is held that an intention to promote class-hatred is not required to be proved in order to attract the application of cl. (h) the whole ground from underneath the judgment, if I may say so with all respect to the learned Judges, is taken away.

[57] I have not had the advantage of reading the judgment of Bhandari J., in Criminal Original No. 30 of 1946⁵ in which, as observed by my learned brother, another Special Bench has followed, A. I. R. 1939 Lah. 81.⁴ The judgment was not available in the office and, on making enquiries, I was given to understand that the judgment was not yet ready. It is my misfortune, therefore, that I have had to form my conclusions without considering the reasons on which the decision in the above-mentioned case was based.

[58] The judgment of a Special Bench of the Rangoon High Court in A. I. R. 1938 Rang. 417,⁶ which had been relied upon by my learned brother does not seem to me to lend any support to the view taken by him. Action had been taken against the publisher of the newspaper 'The Sun' in respect of two articles. One of these

articles gave a true and correct version of the riot between Indians and Burmans. It made no attempt to apportion blame, both sides being stated to have committed murders, looted shops, burnt property, and desecrated places of worship. It ended with an appeal to the natives of Burma to live amicably and unitedly with all foreigners who had come to the country for the purpose of trade. It was held, and if I may say so with respect, quite rightly held that the article had no tendency to create feelings of enmity or hatred between the Indians and the Burmans. The other article contained an attack on "Indian bad characters" and it was held that "Indian bad characters" not being a class within the meaning of the section, the article could not be held to be hit by it. I am unable to discover anything in the decision having any bearing on the present case.

[59] For the foregoing reasons, I am of the opinion that although one of the three articles complained of cannot be held to justify it, the order of the Provincial Government under S. 3, Press (Emergency Powers) Act (23 of 1931), calling upon the petitioner to deposit a sum of Rs. 3000 by way of security cannot, in view of the contents of the other two articles be held to be illegal or unwarranted. We as a Court of law are not concerned with the ethics or the propriety of that order nor have we any jurisdiction to modify it on account of one of the three articles complained of having been found to be not objectionable at all. We can only uphold or set aside the order in its entirety.

[60] I have no hesitation in agreeing with the opinion expressed by Bhide J. in A. I. R. 1939 Lah. 81⁴ as to the drastic nature of the provisions of the Press Emergency Act, if they are given their literal meaning, and am fully alive to the danger expressed by my brother Munir to be implicit in these provisions of making it impossible for the Press to function even within the narrowest limits. I yield to none in my anxiety not to put any unnecessary limitations or restrictions on the liberty of the Press and I very strongly hold the view that it is the duty of Courts of justice to act as the guardians of such liberty. However, if the words of the statute restricting such liberty are quite clear, a Court of justice cannot refuse to give effect to them on grounds of hardship. That the provisions of the statute are too drastic or have the effect of placing very irksome and even undesirable restrictions on the Press may be a ground for the Executive to use those provisions very sparingly and with circumspection but they can be no ground for the Court to read into them reservations and qualifications which do not exist.

[61] For the foregoing reasons, I would dismiss the petition, but, having regard to the circumstances of the case, would make no order as to costs.

[62] **Md. Sharif J.**—I have studied the judgments of my learned brothers and I agree with Munir J. in his conclusions. I would, however, like to add a little. The expression "classes" as used in S. 153A, Penal Code, and in S. 4, Press Emergency Act is difficult of exact definition. It certainly covers well-defined religious denominations and racial groups readily ascertainable where there is some element of permanence and the group is sufficiently numerous: 57 Bom. 253.⁶ Beyond that it is not safe to speculate and each case must be decided on its own facts. But it cannot cover a political party or group held together by the community of interests to achieve a common objective. Political parties come and go and are susceptible to rapid changes in their complexion and composition. To hold otherwise would lead to strange and inconvenient results. In that case a severe attack on the motives and methods of a political party may be actionable and this would retard the growth of a better and healthier society particularly in countries which aim at a democratic form of government. It would, therefore, follow that the leader of a political party howsoever eminent he might be cannot be placed on the same pedestal as the founder of a religion or a spiritual head whose votaries are animated by the common faith and not actuated by expediency. By his very position and activities a political leader invites criticism and exposes himself to censure and even ridicule. It would not make any difference if his followers or partisans solely or predominantly belong to one religious community so long as the attack is in respect of matters pertaining to their political views and ideals. Where, however, it concerns their religious tenets and beliefs different considerations will work.

[63] The offending article must be judged in the light of the principles enunciated above. That Mr. Gandhi is a great political leader cannot be doubted for one moment. His whole life has been inextricably bound up with the cause of his countrymen and country and he has pursued his convictions with unflinching determination. He may not be a regular or a formal member of the Congress, but he is still the mind and soul of the Congress. By his lifelong services and his sufferings for the cause he holds dear and by his austere life he has also won the respect and esteem of a large number of persons who do not belong to his own community or who might not otherwise agree with his methods or opinions. But his political group is not a "class" and any criticism or denunciation of it cannot promote

"class-hatred", nor would his unique position make him immune from the attacks to which as a political leader he might be subject.

[64] It was conceded by the learned Advocate-General that an abuse of a political leader might not fall under the Press Act, but it was contended that the entire Hindu community looks upon Mr. Gandhi as a religious head and for that reason an abuse of him by a Muslim would engender feelings of "enmity or hatred" between the Hindus and the Muslims. Admittedly Mr. Gandhi is not the founder of a religion or a religious sect. He would not take it as a compliment to be called an orthodox Hindu. At his prayer meetings the holy books of different religions are frequently recited and he delights in treating all persons of different faiths as brothers. The Hindu community is said to be a vast body in which atheists, polytheists and agnostics all have their place. Whatever may be said of Mr. Gandhi's universal sympathy, surely he cannot be said to be the religious head of those who do not believe in God. His own faith in God is living and real. He has never claimed to be a religious head and the place he has carved out for himself in the hearts of the community of his birth was attained not on account of his dogmas but through service and suffering in a political cause. There is no material before us to suggest that the Hindu community has accepted him as its "prophet" and the opinion of the writer of an article quoted by my learned brother Achhru Ram J. appears to be his personal one. Be that as it may, Mr. Gandhi might occupy the dual status of a political leader and a religious head. But he is discussed in the article in the role of one and not the other. The language employed about him is violently intemperate and unfortunately the vernacular press has yet to learn and cultivate the art of saying things in a manner which shall not grate upon decent ears. Whatever other remedies might be available, S. 4 of the Press Act has no application.

[65] I would, therefore, accept this petition and set aside the order of the Provincial Government.

Per Special Bench—As there is a difference of opinion among the Judges forming the Special Bench, the decision is in accordance with the opinion of the majority. The order of the Provincial Government, dated 7th October 1946, requiring the petitioner to deposit with the District Magistrate, Lahore, security to the amount of Rs. 3,000 under S. 7 (3), Press (Emergency Powers) Act, is therefore set aside and the parties are directed to bear their own costs.

V.R.

Order set aside.

A. I. R. (35) 1948 Lahore 184 [C. N. 50.]

FULL BENCH

TEJA SINGH, MOHAMMAD SHARIF AND
ABDUR RAHMAN JJ.

Emperor v. Hayat Fateh Din—Accused—Respondent.

Criminal Appeal No. 991 of 1945, Decided on 2-12-1946, referred by Teja Singh and Mohammad Sharif JJ., D/- 19-7-1946.

(a) Criminal P.C. (1898), S. 195—"Court," meaning of—Magistrate must be acting judicially—Magistrate cancelling report under S. 173 on police recommendation—Magistrate acts as administrative or ministerial officer and not as "Court".

The term "Court" in S. 195 means the same thing as a "Court of Justice" in the Penal Code and a Magistrate constitutes "Court" only when he acts judicially. [Para 18]

Thus where the police after investigation finds that the report of offence made to it is false, and recommends to a Magistrate for cancellation of the report and the Magistrate cancels the report under S. 173, the Magistrate acts merely as an administrative or ministerial officer and not as a "Court." To such a case S. 195 has no application: 30 A. I. R. 1943 Lah 31 and 17 I. C. 1000 (Bom.), *Approved*; 33 A. I. R. 1946 Bom. 7, *Not foll.*; *Case law referred.* [Paras 18, 29]

Annotation:- ('46-Com) Cr. P. C. S. 174 N. 10; S. 195, N. 17.

(b) Penal Code (1860), Ss. 211 and 182—Cancellation of report of offence by Magistrate under S. 173, Criminal P. C. on police recommendation after investigation—Police can start proceedings against maker of report under S. 211 for making a false charge.

When a report is made to the police charging another person with the commission of an offence and the police after investigation finds that the report is false and has the case cancelled by the Magistrate under S. 173 the charge made by the complainant in the report not being the subject-matter of any judicial proceedings in Court, action by the Magistrate under S. 173 being only administrative and not judicial and consequently S. 195 (1) (b) not applying to the case, it is open to the police to prosecute the maker of the report under S. 211, Penal Code, for making a false charge. *Case law referred.* [Para 44]

Annotation :- ('46-Com) Cr. P. C. S. 173 N. 10.

Cases referred :-

1. ('36) 23 A. I. R. 1936 Lah. 238 : 161 I. C. 288 : 37 Cr. L. J. 426, Ghulam Rasul v. Emperor.
2. ('41) 28 A. I. R. 1941 Lah. 216 : 195 I. C. 102 : 42 Cr. L. J. 667, Shah Mahomed v. Emperor.
3. ('43) 30 A. I. R. 1943 Lah. 31 : I. L. R. (1942) Lah. 675 : 204 I. C. 572 : 44 Cr. L. J. 305, Nota Ram v. Emperor.
4. ('28) 9 Lah. 408 : 15 A.I.R. 1928 Lah. 259 : 109 I.C. 685 : 29 Cr. L. J. 605, Mahommada v. Emperor.
5. ('25) 12 A. I. R. 1925 Pat. 483 : 4 Pat. 323 : 86 I.C. 825 : 26 Cr. L. J. 889, Mahomad Yassin v. Emperor.
6. ('34) 21 A. I. R. 1934 Mad. 175 : 148 I. C. 593 : 35 Cr. L. J. 698, Rangaswami Goundan v. Emperor.
7. ('39) 26 A. I. R. 1939 Rang. 148 : 180 I. C. 906 : 40 Cr. L. J. 432, King v. Ma E.
8. ('39) 26 A. I. R. 1939 Sind 65 : I. L. R. (1939) Kar. 388 : 180 I. C. 650 : 40 Cr. L. J. 461, Mt. Raji v. Allauddin M. Samo.
9. ('24) 46 All. 906 : 11 A.I.R. 1924 All. 779 : 82 I. C. 167 : 25 Cr. L. J. 1239, Kashi Ram v. Emperor.
10. ('29) 51 All 382 : 15 A.I.R. 1928 All. 765 : 111 I.C. 858 : 29 Cr. L. J. 938, Prag Datt Tewari v. Emperor.
11. ('46) 33 A. I. R. 1946 Bom. 7 : I. L. R. (1945) Bom. 1056 : 223 I. C. 35 : 47 Cr. L. J. 321, Bajaji Appaji v. Emperor.

12. ('17) 15 A. L. J. 767 : 4 A. I. R. 1917 All. 223 : 39 All. 715 : 42 I. C. 761 : 18 Cr. L. J. 1017, Mathura Prasad v. Emperor.

13. ('29) 16 A. I. R. 1929 Sind 132 : 23 S. L. R. 285 : 117 I. C. 147 : 30 Cr. L. J. 732, Chuhermal Nihalmal v. Emperor.

14. ('38) 25 A. I. R. 1938 Lah. 469 : 175 I. C. 850 : 39 Cr. L. J. 646, Brahmdeo v. Emperor.

15. ('38) 25 A. I. R. 1938 Pat. 242 : 175 I. C. 831, Deonandan Tiwari v. Draupadi Koer.

16. ('32) 19 A. I. R. 1932 Pat. 72 : 136 I. C. 842 : 33 Cr. L. J. 349, Raghunath Pusi v. Emperor.

17. ('30) 17 A. I. R. 1930 Lah. 945 : 12 Lah. 16 : 129 I. C. 481 : 32 Cr. L. J. 339, Sunder Singh v. Emperor.

18. ('12) 17 I. C. 1000 : 13 Cr. L. J. 904 (Bom.), Emperor v. Chandabhai.

19. ('41) 28 A. I. R. 1941 Bom. 294 : 196 I. C. 104 : 42 Cr. L. J. 814, J. D. Boywalla v. Sorab Rustomji.

20. ('33) 20 A. I. R. 1933 Pat. 242 : 12 Pat. 234 : 146 I. C. 70 : 34 Cr. L. J. 1198, Uma Singh v. Emperor.

21. ('17) 19 P. R. 1917 Cr. : 4 A. I. R. 1917 Lah. 338 : 39 I. C. 692 : 18 Cr. L. J. 548, Emperor v. Gurditta.

22 & 23. ('12) 34 All. 522 : 16 I. C. 510 : 13 Cr. L. J. 702, Hardwar Pal v. Emperor.

24. ('17) 44 Cal. 650 : 4 A. I. R. 1917 Cal. 596 : 36 I. C. 857 : 18 Cr. L. J. 25, F. A. Brown v. Anand Lal.

25. ('16) 24 C. L. J. 134 : 4 A. I. R. 1917 Cal. 593 : 43 Cal. 1152 : 36 I. C. 845 : 18 Cr. L. J. 13, Tayabullah v. Emperor.

26. ('26) 53 Cal. 824 : 14 A. I. R. 1927 Cal. 95 : 99 I. C. 118 : 28 Cr. L. J. 86, Samir v. Sajidar Rahman.

26a. ('32) 56 Bom. 213 : 19 A.I.R. 1932 Bom. 185 : 137 I. C. 134 : 33 Cr. L. J. 386, In re Indrachand Bachraj.

27. ('22) 24 Bom. L. R. 1153 : 10 A. I. R. 1923 Bom. 105 : 71 I. C. 823 : 24 Cr. L. J. 171, In re Wasudeo Ramchandra.

28. ('32) 55 Mad. 611 : 19 A. I. R. 1932 Mad. 363 : 137 I. C. 312 (F B) : 33 Cr. L. J. 479, Registrar High Court v. Kodangi.

29. ('25) 12 A. I. R. 1925 Pat. 717 : 5 Pat. 33 : 88 I. C. 1045 : 26 Cr. L. J. 1269, Daroga Gope v. Emperor.

30. ('39) 181 I. C. 928 : 26 A. I. R. 1939 Nag. 226 : 40 Cr. L. J. 638, Sarup Singh v. Emperor.

31. ('28) 6 Rang. 578 : 15 A.I.R. 1928 Rang. 254 : 114 I. C. 685 : 30 Cr. L. J. 342, Rambrose v. Emperor.

Anant Ram Khosla, Asst. Legal Remembrancer—
for the Crown.

Abdul Aziz Khan—for Respondent.

ORDER OF REFERENCE

(D/- 19th July 1946.)

Teja Singh and Mohammed Sharif JJ.
—Hayat, respondent, made a report to the police that his house had been broken into and valuable property carried away by four persons named therein. A case under S. 457/392, Penal Code, was registered. On investigation it was found to be wholly false and the police moved the Magistrate to strike off the case in accordance with S. 173, Criminal P. C. This was done. A complaint under S. 182/211 was then filed by the Sub-Inspector of Police to whom the first report had been made. The trial Court convicted the respondent under S. 211, Penal Code, and sentenced him to 18 months' rigorous imprisonment. On appeal the learned Sessions Judge set aside the conviction on the short ground that no complaint having been made by the Magistrate who had passed orders

cancelling the first case, in accordance with the provisions of S. 195 (1) (b), Criminal P. C., the entire proceedings started on the Sub-Inspector's complaint and culminating in the respondent's conviction under S. 211, Penal Code, were illegal and without jurisdiction. The Crown has now preferred this appeal against the order of acquittal.

[2] The words of S. 195, Criminal P. C., are:

"No Court shall take cognizance—

(a) of any offence punishable under Ss. 172 to 188, Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate;

(b) of any offence punishable under any of the following sections of the same Code (i. e. Indian Penal Code), namely, Ss. 193, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

Sub-section (2) lays down that in cls. (b) and (c) of sub-s. (1) the term "Court" includes a Civil, revenue or criminal Court. Section 182, Penal Code, is very widely worded and relates to false informations given to all kinds of public servants. It says:

"Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, Shall be punished with imprisonment" etc.

[3] The scope of S. 211, Penal Code, on the other hand, is limited and is confined to cases where criminal proceedings are instituted or false charges are made against any person for having committed an offence. The words of the first part of the section are:

"Whoever, with intent to cause injury to any person institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished" etc.

The second part of the section deals with criminal proceedings or false charges of an offence punishable with death, transportation for life or imprisonment for seven years or upwards.

[4] It is not denied before us that a false report made to the police with the intention of causing a police officer to start an investigation which he would not do if the true facts were known to him, does come within the purview of S. 182. It is also admitted that if a false complaint is made to a Court charging a person with the commission of an offence, S. 211 would come into operation and the same would

be the case if the police after investigating a report made to them prosecute the person complained of and the case is later on found to be false. What was, however, urged by Mr. A. R. Khosla, learned counsel for the Crown, was that since in this case the police found the report to be false and did not prosecute any person in Court, it cannot be said that the respondent committed an offence in or in relation to any proceeding in Court. He admitted that the police reported the result of the investigation to the Ilaqa Magistrate and the latter ordered the case to be cancelled, but he explained that the Magistrate was then acting in ministerial or executive capacity and not as a Court. The view taken by Blacker J. in A. I. R. 1936 Lah. 238,¹ is against Mr. Khosla and this is the case that has been relied upon by the learned Sessions Judge. There a report had been made to the police by the petitioner that a certain person had stolen his watch from his car. The police came to the conclusion in investigation that the report was false and the watch had been removed by the petitioner himself. The case was accordingly reported to the Magistrate for cancellation and after this had been done, the petitioner was challenged under Ss. 193 and 211, Penal Code. The learned Judge held that the words in clause (b) of sub-section (1) of S. 195, Criminal P. C., "in relation to any proceeding in any Court" apply to the case of a false report or a false statement made in an investigation by the police with the intention that there shall in consequence of this be a trial in the criminal Court. Bhide J. followed this case in A. I. R. 1941 Lah. 216.² The facts of that case were that one Shah Mohammad made a report to the police charging Mt. Rehmat Bibi with an offence under S. 324, Penal Code. After investigation the police found the report to be false and the case was struck off, evidently by a Magistrate. Thereafter Shah Mohammad filed a complaint in the Court of a Magistrate on the same allegations. While the proceedings in that case were still going on, an Inspector of police instituted a complaint against Shah Mohammad under S. 182, Penal Code, on the ground that the report made by him to the police was false. It was held that the case came within the purview of S. 211 and not merely that of S. 182, and that a complaint by the Court concerned was necessary to take proceedings against Shah Mohammad. In A. I. R. 1943 Lah. 31,³ the facts of which were almost on all fours with those of the case decided by Bhide J., a Division Bench consisting of Young C. J. and Sale J. overruled Bhide J.'s decision with the following observations:

"An offence falling under S. 182 is included in the more serious offence falling under S. 211, and a prosecu-

tion for a false charge may be either under S. 182 or S. 211, though clearly if S. 211 does apply and the false charge is serious, prosecution should be under the more serious S. 211. But this does not mean that where a person makes a false complaint to the police and the offence so far as S. 182, Penal Code, is concerned is complete and the police in conformity with the provisions of S. 195, Criminal P. C., file a complaint and a prosecution is lodged under S. 182, Penal Code, the proceedings under S. 182 must subsequently be quashed because the accused not content with the false report to the police, subsequently makes a false complaint on the same facts to a Magistrate in addition and thereby exposes himself to a prosecution under S. 211, Penal Code."

It was urged before us that this case was distinguishable from the present case, inasmuch as here we are only concerned with a report made to the police and there was no subsequent complaint in Court by the maker of the report. But a perusal of the judgment would go to show that in that case also there had been an investigation on the police report and the case had been ultimately struck off by the order of a Magistrate. In fact this appears to be the usual procedure. A. I. R. 1936 Lah. 238,¹ which had been specifically relied upon by Bhide J was also cited before their Lordships in A. I. R. 1943 Lah. 31,² but was distinguished on the ground that "it did not deal specifically with the question now at issue."

[5] There is an earlier Division Bench decision of this Court, 9 Lah. 408,⁴ which does not appear to have been cited in any of the cases mentioned above. Therein a report was made to the police by Mohammada against three persons. The police after enquiry found that the story given in the first information report was false and they refused to take any action against two of the persons complained against. They, however, challaned the remaining third person not for the offence which he was alleged to have committed according to Mohammada but for being in possession of an illicit arm. He too was acquitted by the Court. One of the two persons against whom no action had been taken by the police, prosecuted Mohammada under S. 211 for having made a false charge against him. It was held that clause (1) (b) of S. 195, Criminal P. C., did not apply and the offence alleged in the complaint was not committed in, or in relation to, any proceeding in any Court. No doubt there is some distinction between the facts of this case and those of A. I. R. 1943 Lah. 31,³ but the principles laid down in the latter do militate against those followed in the former and there is thus a conflict of authority.

[6] The opinion in other High Courts also is by no means unanimous. It was held in A. I. R. 1925 Pat. 483,⁵ that where an information to the police is followed by a complaint to the Court based on the same allegations and the same

charge, the sanction of complaint of the Court itself under S. 195 (1) (b) of the Code is necessary before the Court could take cognizance of an offence punishable under S. 211, Penal Code, in respect of the false charge made to the police, on the ground that it was an offence committed in relation to a proceeding in Court. The fact that the complaint was not investigated by the Court, does not make any difference.

[7] In A. I. R. 1934 Mad. 175,⁶ the accused made a complaint to the police charging certain persons in connection with murder. The police investigated into the matter and certified the complaint to be false. After the police report had been considered by a Magistrate and the case had been cancelled, the police preferred a complaint against the accused under S. 211. The accused raised the objection that it was a matter for the Magistrate under S. 195, Criminal P. C., and the complaint by the police was not competent. It was held that the Magistrate had not taken any judicial notice nor was the proceeding a judicial proceeding and the police were entitled to prefer the complaint.

[8] Similar view was taken by the Rangoon High Court in A. I. R. 1939 Rang. 148.⁷

[9] In A. I. R. 1939 Sind 65,⁸ a Division Bench of the Chief Court, Sind, went to the length of holding that

"it is not the intention of the Legislature that an offence under S. 211, Penal Code, can be made subject of a complaint only by Courts or public officers, and that when an offence under S. 211 is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual, and it is not necessary that the complaint must be made by a Court or by a public officer."

[10] The Allahabad view as expressed in 46 ALL. 906⁹ and 51 ALL. 382¹⁰ is the same as that of the Madras High Court.

[11] The Bombay High Court takes the contrary view. In a recent case reported in A. I. R. 1946 Bom. 7,¹¹ the question was fully considered with reference to authority and it was laid down that :

"Where information relating to the commission of a cognizable offence is given to an officer in charge of a police station under S. 154, Criminal P. C., and is followed by an investigation by him, he is bound under S. 173 (1) to complete it without any unnecessary delay, and if the complaint be held to be false, the offence under S. 211, Penal Code, will have to be alleged to have been committed by the complainant in relation to the proceedings in the Magistrate's Court."

It was further held that the word "Court" in the Criminal Procedure Code has a wider meaning than the words "Court of Justice" as defined in the Penal Code and hence the Magistrate passing an order on a final report of the police sent after the investigation under S. 173 should be deemed to be a Court passing a final

judicial order disposing of the information given to the police.

[12] As the point involved is of considerable importance and is of frequent occurrence, we think that an authoritative decision by a larger Bench is desirable and accordingly we formulate the following question for reference to a Full Bench. "When a report is made to the police charging another person with the commission of an offence, and the police, after investigation, finds that the report is false and has the case cancelled under the provisions of S. 173, Criminal P. C., is it competent to the Police officer to whom the report is made, or the officer to whom he is subordinate, to start proceedings under S. 211, Penal Code, against the maker of the report for making a false charge?"

[13] The papers to be laid before the Hon'ble the Chief Justice for necessary orders.

Order of the Full Bench (2-12-1946)

[14] **Teja Singh J.** — The following question was referred for decision to the Full Bench :

"When a report is made to the police charging another person with the commission of an offence, and the police, after investigation, finds that the report is false and has the case cancelled under the provisions of S. 173, Criminal P. C., is it competent to the police officer to whom the report is made, or the officer to whom he is subordinate, to start proceedings under S. 211, Penal Code against the maker of the report for making a false charge?"

[15] The facts of the case may be shortly stated. Hayat son of Fateh Din went to the police station Narowal on 8-2-1945, and made a report that his house had been burgled by four persons on the preceding night and they had robbed him of several pieces of jewellery and a few clothes. It was also stated in the report that he had identified all the four culprits. The police registered a case under ss. 457 and 392, Penal Code, but on investigation came to the conclusion that the report was entirely false. Accordingly, they moved the Magistrate to strike off the case under S. 173, Criminal P. C. The Magistrate accepted their recommendation and ordered the case to be struck off. On 7-4-1945, the Sub-Inspector of Police to whom Hayat had made the report started proceedings under S. 211, Penal Code, against him. The trial Magistrate convicted Hayat and sentenced him to 18 months' rigorous imprisonment. Hayat Mohammad appealed to the Sessions Judge who set aside his conviction on the ground that there was no proper complaint before the Court and that according to the provisions of S. 195(1)(b) a complaint under S. 211 could only be made by the Magistrate who had cancelled the case. The Crown then preferred an appeal to this Court against the order of the Sessions Judge.

[16] The ordinary rule of criminal jurisprudence is that when an offence is committed it is open to any person to move the machinery of law. Section 195, Criminal P. C., is an exception to the general rule. Part (a) of it relates to offences punishable under ss. 172 to 188, Penal Code and lays down that no Court shall take cognizance of these offences except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate. Clause (b) of the section deals with offences punishable under ss. 193, 194, 195, 196, 199, 200, 205 to 211 and 228 and says that no Court shall take cognizance of them, "when such offence is alleged to have been committed in or in relation to any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

[17] Section 211, Penal Code reads as follows:

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment etc."

Analogous to the offence of making false charge against a person, though less serious than it, is the offence of giving false information to a public servant which is punishable under S. 182, Penal Code. As this section was also referred to us in the course of arguments and I shall have to say something about it hereafter, I may as well reproduce it also. The words of the section are:

"Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment etc."

A comparison of S. 211 and S. 182 would go to show that the offence under the former section includes that under the latter but it is in more aggravated form. Section 211 comes into action (a) when one institutes or causes to institute a criminal proceeding against another person, and (b) when one falsely charges another person having committed an offence. I have no doubt that a false charge can be made in Court as also outside Court. This view is supported by observations made by Walsh J. in 15 A. L. J. 767.¹² This is what his Lordship said later on in 46 ALL. 906.⁹

"If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the

police, or leaving the police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court that act of his, whether verbal or written, if made to an officer of the law authorized to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that Court proceedings be taken against him, amounts to making a charge."

Judged in the light of these remarks there can be no doubt that Hayat's act amounted to making a charge. This fact was not denied by Mr. A. R. Khosla learned counsel for the Crown. He, however, urged that S. 195 (2) did not apply for two reasons. Firstly, because the Magistrate who took action under S. 173, Criminal P. C., did not constitute a Court and secondly that no offence was committed in relation to proceedings in Court. The respondent's counsel joined issue with him on both the points.

[18] As regards the first point, what has to be decided is whether the Magistrate to whom the police submits the final report of the investigation acts as a Court or merely as an administrative or ministerial officer. It is admitted before us that a Magistrate has to perform various functions as an administrative officer and while engaged in that capacity he cannot be regarded as a Court. The term "Court" is not defined in the Criminal Procedure Code nor in the Penal Code. Section 3, Evidence Act, lays down that "Court" includes all Judges and Magistrates and all persons except arbitrators, legally authorized to take evidence. But, that definition is framed only for the purposes of the Act itself and cannot be extended beyond its legitimate scope. Section 20, Penal Code defines the term "Court of Justice" as denoting a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially. It is laid down in the last clause of the Criminal Procedure Code that all words and expressions used in the Code and defined in the Penal Code but not defined in the Code shall be deemed to have the meanings respectively attributed to them by that Code. I should think that the term "Court" used in S. 195, Criminal P. C., means the same thing as a "Court of Justice" and a Magistrate constitutes "Court" only when he acts judicially. The question is whether the functions of the Magistrate under S. 173, Criminal P. C. are judicial. It is important to note that the section forms part of Chapter XIV the heading of which is "information to the police and their powers to investigate." Most of the sections of this Chapter

deal only with this subject. No doubt, there are some sections in the chapter which lay down certain duties of Magistrates but they too are in connection with the investigation and are confined to the stage before the case is put in Court. It is no doubt true, that the Magistrate to whom a report regarding the commission of a cognizable offence is made under S. 157 can, if he so likes dispose of the case himself by virtue of S. 159, but this he can do only by taking cognizance of the case under S. 190. The important words of S. 159 are "or otherwise to dispose of, the case in manner provided in this Code." But, if the Magistrate does not do this and he merely directs an investigation by one of the Magistrates subordinate to him or undertakes a preliminary inquiry himself, he merely acts as a ministerial officer and not judicially. The same in my opinion, is his position when he acts under S. 173. The section lays down that as soon as an investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report a report, in the form prescribed by the Provincial Government setting forth the names of the parties etc., and stating whether the accused has been forwarded in custody or has been released on his bonds, and, if so, whether with or without sureties and (shall also) communicate in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given. Now, a police-report can be in three forms: (1) that the person arrested by them is in the opinion of the investigating officer guilty of a cognizable offence, (2) that a cognizable offence appears to have been committed but the offender cannot be traced and (3) that the report made to the police is false and no cognizable offence has been committed. The section is silent as to what the Magistrate to whom the report is made is to do in the first two cases, evidently because S. 190 gives him ample powers to take cognizance of the offence and to proceed in the manner provided in Chap. XV. If the Magistrate decides to take cognizance, he acts judicially and as a Court. Sub-section (3) of S. 173 lays down what a Magistrate is to do in the third case. It says that whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. This, in my opinion, is a pure administrative or ministerial act. I agree that the Magistrate is not bound to accept the opinion of the investigating officer and even if the report is that no cognizable

offence has been committed, he can yet proceed under S. 190. But, if he does so, and not until he does so, he can be regarded as acting judicially.

[19] The learned counsel for the respondent relied upon two Single Bench decisions of this Court reported in A. I. R. 1936 Lah. 238¹ and A. I. R. 1941 Lah. 216.² In the first case, one Ghulam Rasul made a report to the police accusing another person of stealing a watch from his car. The police investigated the case and formed the opinion that the report was false and that the watch had been removed by Ghulam Rasul himself. Accordingly, they reported the case to the Magistrate for cancellation. After that Ghulam Rasul was challaned under Ss. 193 and 211 and the Magistrate who took cognizance of the challan recorded the evidence of the prosecution witnesses and framed charge against Ghulam Rasul. Ghulam Rasul applied to the High Court for quashing the charges. The petition was accepted by Blacker J. There was no discussion of the question whether the Magistrate who took action under S. 173, constituted "Court." This is all what the learned Judge said:

"I am clear that the words in this sub-section 'in relation to any proceedings in any Court' apply to the case of a false report or a false statement made in an investigation by the police with the intention that there shall in consequence of this be a trial in the criminal Court, and I find support for this view in the case reported in A. I. R. 1929 Sind 132.¹³

In A. I. R. 1929 Sind 132,¹³ relied upon by Blacker J. the accused addressed two applications, one to the Assistant Superintendent of Police and the other to the Sub-Divisional Magistrate making serious allegations of trespass and theft against certain persons. The first petition was dealt with by the Inspector of Police who found that the allegations made by the accused had no foundation. He accordingly applied to the District Superintendent of Police for sanction to prosecute the accused. The sanction was given and on this the Inspector lodged a complaint under S. 211, Penal Code. The second application came up before the Sub-Divisional Magistrate, but he did not take any action thereon forthwith. The learned Judges held that where a false information given to the police was followed by a complaint to the Magistrate on the same facts and the same charge, a complaint by such Magistrate is essential.

[20] The second case (A. I. R. 1941 Lah. 216)² was decided by Bhide J. The facts of this case were also distinguishable. One Shah Mohammad made a report to the police that Mt. Rehmat Bibi had committed an offence under S. 324, Penal Code. After investigation, the police found the report to be false and the case

was struck off. Thereafter, Shah Mohammad filed a complaint in the Court of a Magistrate on the same allegations. After Shah Mohammad had examined the evidence and the accused in the case had been charged, the Inspector of Police instituted a complaint against Shah Mohammad under S. 182 on the ground that the report made by him to the police was false. Bhide J. following A. I. R. 1936 Lah. 238¹ and A. I. R. 1929 Sind 132¹³ held that where a person not merely gave false information to the police about another but made a false charge in Court against him and when he was eventually acquitted, the case came within the purview of S. 211 and not merely that of S. 182, and that complaint by the Court concerned was necessary to take proceedings against such person.

[21] In A. I. R. 1943 Lah. 31,³ a Division Bench consisting of Young C. J. and Sale J. expressly dissented from the view taken by Bhide J. The facts of that case were analogous to those in A. I. R. 1941 Lah. 216² and it was held that the proceedings under S. 182, Penal Code, cannot be quashed on the ground that the trying Magistrate had no jurisdiction to try the accused without sanction of the Court in which the subsequent false complaint was lodged. A. I. R. 1936 Lah. 238¹ was also cited before the learned Judges, but they did not consider it because they thought that it did not deal specifically with the question that was at issue before them.

[22] The other Lahore case cited before us in this connection was A. I. R. 1938 Lah 469.¹⁴ The question was whether an accused person was entitled to a copy of the order of a Magistrate passed under S. 173, Criminal P. C., that the case be struck off. This is also a decision by Blacker J. and the observations made by him were as below:

"The Division Bench judgment of the Patna High Court in A. I. R. 1938 Pat 242¹⁵ is a clear authority for holding that the order of a Magistrate on a police-report under S. 173, Criminal P. C., that a case be struck off is an administrative order and not a judicial order and I have no hesitation in following it. The Single Bench judgment quoted, A. I. R. 1932 Pat. 72,¹⁶ is not really an authority to the contrary. It only lays down that the opposite order, i. e., an order taking cognizance on a police-report is a judicial order. It is an order under S. 204, Criminal P. C., which is in Chapter XVII, which is headed 'Commencement of proceedings before Magistrates'. This would imply that until these orders have been passed, the judicial proceeding has not commenced."

No reference in this case was made to the 1936 case.

[23] The respondent's counsel also drew our attention to A. I. R. 1930 Lah. 945,¹⁷ a decision by Bhide J. That was a petition by the father of a person who had been arrested by the police in connection with the investigation of a cognizable

offence. The allegations were that the prisoner was illegally and improperly detained in custody by the police and it was prayed that either the prisoner be released or his legal adviser and relatives be permitted to see him. The record showed that the prisoner after he had been arrested was produced before a Magistrate who remanded him to police custody under S. 167, Criminal P. C. While discussing the question whether a prisoner in the custody of police could have an access to legal advice the learned Judge referred to S. 167, Criminal P. C., and held that he was unable to accept the contention that a Magistrate acts under S. 167, Criminal P. C., in his executive capacity. His remarks were:

"Section 167 requires a police officer to submit his diaries to the Magistrate within 24 hours of the arrest of an accused person and it is left to the latter to decide whether the accused should be detained in custody (whether of the police or any other custody) any longer. In deciding this question the Magistrate will presumably be guided by the evidence already available and the prospect of getting further relevant evidence as regards the alleged offence. The weighing of such evidence with respect to an alleged offence seems to me to be essentially a judicial function and it seems to be precisely for this reason that the matter is left to a Magistrate and not to a police officer. If the matter were purely executive it could easily have been left to the decision of the investigating officer or his superiors in the Police Department."

With all deference to the learned Judge, I find it difficult to agree with him. The mere fact that a matter is left to a Magistrate rather than to a police officer does not necessarily show that the Magistrate is expected to act in a judicial capacity rather than in executive capacity. According to the Criminal Procedure Code, Magistrates are to perform various functions which strictly speaking, are not the functions of judicial officers. Particularly so is the case regarding the part that they have to play during the investigation of a case by the police under Chap. XIV. It will be observed that all that a Magistrate before whom an accused person is produced under S. 167 has to do is to decide whether or not he must go back to the custody of the police or he should be released and the fact that such a Magistrate need not be a Magistrate having jurisdiction to try the case or to commit it for trial shows that he has not to act judicially but merely in executive capacity, that is, in the capacity of an officer whose function it is to supervise the police investigation.

[24] The following decisions of the Bombay High Court were cited before us in this connection: 17 I. O. 1000.¹⁶ Here, a Magistrate gave to the police what is called a B summary in regard to the accusation made by the complainant. The complainant was, therefore, prosecuted under S. 211, Penal Code, for giving a false report. It was held that the Magistrate was competent to try the accused. The giving of a B summary was by

no means tantamount to the grant of a magisterial sanction for the prosecution of the original complainant, inasmuch as a B summary was not an order passed under the Code of Criminal Procedure at all, but was a mere administrative order by the Magistrate for the purpose of facilitating police work and police statistics. It was further held that the offence was constituted by the maliciously false report which the accused submitted to the police and not in relation to any proceeding in any Court.

[25] A. I. R. 1941 Bom. 294.¹⁹ In this case, one B made a report to the police charging his opponent with the offence of cheating. The police registered a case and started investigation. Later on, they arrested the person complained against but when they found that the case was false and no offence had been committed they released the accused on bail. After further investigation they made a report to a Magistrate that no offence had been disclosed and the man should be discharged and his bail bond be cancelled. On this report the Magistrate passed the following order:-

"Accused discharged. Bail bond cancelled. Deposit to be returned."

Subsequently, the person against whom B had made the report filed a case against him under S. 211, Penal Code. It was held that the Magistrate could act upon the report of a police officer without further inquiry and that the order of the Magistrate was a judicial order. Therefore, the alleged false charge was made in or in relation to a proceeding in Court, and for proceeding against the complainant under S. 211, Penal Code, a complaint by the Magistrate was necessary. The important observations made by Beaumont C. J. are as follows:

"It is contended on behalf of the opponent that the order made by the learned Magistrate extending bail and subsequently discharging the accused and cancelling his bail bond, was an administrative order, and not a judicial order, since the Magistrate never considered the merits of the case. I am quite unable to accept that argument. Indeed, it is a novelty to me to hear it suggested that there is any authority which can make an administrative order discharging an arrested person from judicial custody."

[26] In A. I. R. 1946 Bom 7¹¹ the facts were almost the same as in 17 I. O. 1000.¹⁸ The learned Judges discussed the case law on the point and held that where information relating to a cognizable offence is given to an officer in charge of a police station under S. 154, Criminal P. C., and is followed by an investigation by him, he is bound under S. 173 (1) to complete it without any unnecessary delay and if the complaint be held to be false and a B summary is issued, the offence under S. 211 Penal Code, will have to be alleged to have been committed by the complainant in relation to the proceedings in the

Magistrate's Court. They further held that the issue of a B summary on a final report by the police is a judicial order passed under the Code of Criminal Procedure and not a mere administrative order. Their view was that the word "Court" in the Criminal Procedure Code has a wider meaning than the words "Court of Justice" as defined in the Penal Code, and hence the Magistrate passing an order on the police-report sent after the investigation under S. 173 should be deemed to be a Court passing a judicial order disposing of the information given to the police.

[27] The view taken by a Division Bench of the Madras High Court in A. I. R. 1934 Mad. 175⁶ was against the respondent. Here, the accused had made a complaint to the police charging certain persons with murder. The police investigated into the matter and certified the report to be false. The police-report was placed before a Sub-Magistrate and notice was given to the appellant to appear and show cause why his complaint should not be struck off, but he did not appear. The report of the police was accepted by the Sub-Magistrate who ordered further investigation to be stopped. After that the police preferred a complaint under S. 211. It was held that the Magistrate had not taken any judicial notice nor was the proceeding a judicial proceeding and that the police were entitled to prefer the complaint.

[28] A. I. R. 1933 Pat. 242²⁰ is also against the respondent. The point involved in the case was of course, somewhat different from the one that is now before us, but the observations made by the learned Judges were to the effect that when a Magistrate before whom the police-report is placed under S. 173 orders the case to be struck off, his orders are purely administrative or ministerial and not judicial.

[29] From this it will appear that the weight of authority is in favour of the position taken up by the learned counsel for the Crown and I, therefore, decide the first point against the respondent.

[30] Now, as regards the second point. Interpretation of the words "in relation to any proceeding in any Court" occurring in cl. (b) of S. 195 (1) has given rise to more serious conflict of opinion than the meaning of the term "Court". There are three stages in connection with which the offence be regarded as having been committed in relation to a proceeding in Court: (1) Before the proceedings in Court start, (2) when the proceedings are still pending and (3) after the proceedings have terminated. There is not much scope for controversy with regard to the offence committed in the second and the third stage. The former would certainly be in rela-

tion to the proceedings but not the latter. It is the offence committed in the first stage that calls for consideration. One point of view is that in order that the offence should be taken as having been committed in relation to a proceeding the proceeding must be in existence at the time the offence is committed. On the contrary, it is contended that if one commits an offence with the object of starting proceedings in Court or knowing full well that proceedings in Court in connection therewith are bound to come into existence, he cannot evade the consequences of his act merely because no proceedings are pending at the time. The only Lahore case cited before us on this point is 9 Lah. 408.⁴ In this case M made a report against a number of persons alleging that they all came to the place where he and his sister were staying and wanted to murder his sister. The police after inquiry found that the story given by M was false. They took no action against two of the persons complained against but challaned the third under the Arms Act. He too, was acquitted by the Court. One of the two persons against whom the police had taken no action prosecuted M under S. 211. It was urged before this Court that the proceedings in the case were void *ab initio* and illegal inasmuch as they had not been initiated on a complaint in writing made by the Court which tried the third man under the Arms Act. The case came up first before Tek Chand J. who referred to 19 P. R. 1917 (Cr.)²¹ and 34 ALL. 522²² & ²³ and because he had grave doubts as to the soundness of the view taken in those cases he referred the case to a Division Bench. The learned Judges constituting the Division Bench (Shadi Lal C. J. and Agha Haider J) held that cl. (1) (b) of S. 195 had no application and the offence alleged to have been committed by M under S. 211, Penal Code, was not committed in or in relation to any proceeding in Court. After referring to a number of cases this is what the learned Judges observed:

"We prefer to follow the law as laid down in 82 I. C. 167.⁹ Raushan Beg was never charged in any Court, nor was he ever put upon his trial before any Magistrate nor were any proceedings taken against him before the Court in which Nihal Singh was involved. This being so, it cannot be said that the offence under S. 211, Penal Code, with which Mohammada, the applicant, had been charged, was an offence which was committed in or in relation to any proceeding in Court."

I respectfully agree with the view taken by the learned Judges. I do not subscribe to the proposition that before a charge can be regarded as having been committed in relation to a proceeding in Court the proceeding must actually be pending at the time the charge is made because if the charge is made with the clear intention of initiating proceedings in Court and the proceedings actually do take place in consequence of

the charge, it would certainly be in relation to proceedings. I, however, agree that if the particular charge does not result in any proceedings in Court, S. 195(1)(b) cannot apply. The question whether when the charge is made the maker of the charge had the intention of initiating proceedings in Court is one of fact and must be decided in the light of evidence and the circumstances of each case. The mere fact that the charge is made in a report to the police does not necessarily prove such intention.

[31] I now proceed to discuss the decisions of the other Courts cited before us.

[32] 44 Cal. 650.²⁴ In this case there was first an information to the police and then a complaint to the Court based on the same allegations and the same charge. This complaint was investigated by the Court. It was held that the sanction or complaint by the Court itself was necessary even for a prosecution of the informant under S. 211, Penal Code, in respect of the false charge made to the police. In the present case, there being no complaint to a Magistrate the ruling cannot help the respondent. The learned Judges particularly referred to the previous decision of their own Court, 24 C. L. J. 134,²⁵ and quoted with approval the following passage from the judgment in that case:

"A sanction is requisite in respect of an offence under S. 211, Penal Code, only when such offence has been committed in or in relation to any proceeding in any Court; *no sanction is necessary when a false charge has been made to the police and has not been followed by a judicial investigation thereof by a Court.....* The position is different where upon the police report as to the falsity of the complaint the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate; if the Magistrate finds his case to be false, a sanction would be requisite under S. 195(1)(b), as the offence may be said to have been committed in a proceeding in a Court."

The words underlined (here italicised) by me go against the present respondent.

[33] 53 Cal. 824.²⁶ The facts in this case were almost the same as in 44 Cal. 650²⁴ and the learned Judges merely followed that decision.

[34] A. I. R. 1941 Bom. 294.¹⁰ This case has already been referred to in the earlier part of this judgment. The main discussion in the case turned upon the question whether the Magistrate who discharged the accused on the receipt of the police report under S. 173 took cognizance of the case or not and the learned Judges answered the question in the affirmative. After pointing out that the Magistrate was not bound to accept the police report and it was open to him to say that he wanted further investigation to take place this is what they said:

"But in either case the Magistrate is taking cognizance of the case. He cannot discharge the accused, or

direct a further investigation, unless he first takes cognizance."

Further on, they said:

"Although the Code does not expressly so provide, I have no doubt that a Magistrate can act upon the report of a police officer.....and can discharge an accused person without further inquiry. But in such a case the order of the Magistrate is a judicial order which would be open to review by this Court. In my opinion, therefore, the alleged false charge in this case was made in, or in relation to, a proceeding in Court."

[35] A. I. R. 1946 Bom. 7.¹¹ This case has also been referred to above. The respondent's counsel relied particularly upon the observations of Lokur J. that the words of S. 195(1)(b) should be given as wide an application as possible, and further that some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. "False evidence, for instance, may be fabricated for a contemplated suit, or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if a judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. As held in 56 Bom. 213^{26a} the crucial date for the purpose of S. 195, Criminal P. C., is the date when the Court takes cognizance of the offence." The learned Judge quoted with approval the remarks made by Crump J. in 24 Bom. L. R. 1153²⁷ that the words 'in relation to' in S. 195(1)(b), Criminal P. C., are very general and are wide enough to cover a proceeding in contemplation before a criminal Court, though it may not have begun at the date when the offence was committed. As I have already observed, my own view is the same as that of Crump J., but if I may say so with all respect I cannot understand why the words in question should be given as wide an application as possible. The only effect of S. 195(1)(b) is that if the charge is held to be in relation to a proceeding in Court, only the Court can put in a complaint under S. 211. The section has nothing to do whatsoever with the scope of S. 211. My own opinion is, that no injustice will be done by interpreting the words narrowly and in allowing the complaint to be instituted either by the police or by a private person in appropriate cases. I am also inclined to think that the effect of a very wide interpretation of S. 195(1)(b) will be that practically in no case will it be possible for the police to take action under S. 211 in respect of reports made to them

[36] 55 Mad. 611.²⁸ This is a Full Bench decision by three Judges. One of the questions referred to the Full Bench was: When a charge is made by a complainant to the police against one or more individuals, and the police, while

charging one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under S. 476, Criminal P. C., necessary to prosecute the complainant under S. 211, Penal Code, in respect of the person or persons whom the police have not charged before the Court? The question was answered in the negative and it was held that the Court has no jurisdiction to take action under S. 476 against the complainant in respect of those not so charged. 9 Lah. 408⁴ was cited and followed.

[37] 34 ALL. 522²² & ²³. One H made a report against several persons, including one S, at a police station charging them with rioting, etc. The police made inquiry and after investigation sent up several persons for trial, but not S. Some of these persons were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon, S made a complaint to the Magistrate charging H with having made a false report in respect of himself to the police. It was held that the Magistrate acted without jurisdiction in taking cognizance of the complaint without the sanction of the Court. This case was expressly dissented from by the same High Court in 46 ALL. 906.⁹

[38] 51 ALL. 382.¹⁰ The facts of this case were analogous to those in 53 Cal. 824²⁶ and 44 Cal. 650.²⁴ But the learned Judge held that when a false charge is made to the police an offence under S. 211, Penal Code, is complete and it cannot be said, merely because a similar complaint was subsequently made in a Court, that the offence was committed in or in relation to any proceeding in any Court, within the meaning of S. 195 (1) (b), Criminal P. C. and accordingly, a complaint in writing of such Court is not necessary for prosecution for such offence.

[39] A. I. R. 1925 Pat. 483⁵ and A. I. R. 1925 Pat. 717.²⁹ In both these cases reports to the police were followed by complaints in Courts based on the same allegations and the same charges and it was held following 44 Cal. 650²⁴ that the Courts alone could start proceedings under S. 211, Penal Code. Like the Calcutta case these cases have also no bearing on the facts of the present case.

[40] 181 I. C. 928.³ The facts and the decision in this case were also the same as those in 44 Cal. 650.²⁴

[41] A. I. R. 1929 Sind 132.¹³ This case has already been noted in connection with A. I. R. 1936 Lah. 238,¹ and it appears to me to be one of those cases where the maker of the report to the police had from the very start an intention to

initiate proceedings in Court and accordingly action under S. 211 could only be taken by the Court.

[42] 6 Rang. 578.³¹ Here also, the facts were the same as in 44 Cal. 650²⁴ and the learned Judge following the Calcutta case held that the accused should be prosecuted under S. 211, Penal Code on a complaint by the Court and not under S. 182, Penal Code, merely on the complaint of the public servant to whom he had first made the report.

[43] A. I. R. 1939 Rang. 148.⁷ This was a decision by the same Judge who decided the previous Rangoon case. The facts were that M. E. made a report to the police charging one S. K. and M. I. with having abducted her and having committed rape on her. The police, on investigation, found that the charges were false and malicious and threw out the case. M. E. did not carry the case any further or file a complaint in any Court. The police station officer, therefore, prosecuted her under S. 211, Penal Code. The Magistrate thought that the prosecution of M. E. under S. 211, was barred by S. 195 (1) (b) and discharged her. The learned Judge held that S. 195 had no application. His observations on the point were:

"The rulings in 43 Cal. 1152²⁵ and 9 Lah. 408⁴ clearly show that S. 195 (1) (b), Criminal P. C., does not apply to a prosecution for the offence of making a false charge which did not reach any Court of law."

It will thus be seen that most of the authorities cited on behalf of the respondent are distinguishable and they have no bearing on the question that falls for determination in the present case. On consideration of the cases that are in point, I am of the opinion, that the preponderance of authority supports the view that since the charge made by Hayat in the report was not the subject matter of any judicial proceeding in Court, S. 195 (1) (b) had no application and consequently, it was open to the police to prosecute him under S. 211, Penal Code.

[44] In the result I would answer the question referred to the Full Bench in the affirmative and direct that the case be sent back to the Division Bench with the expression of opinion.

[45] Mohd. Sharif J.—I agree.

[46] Abdur Rahman J. — I agree that the question be answered in the affirmative.

R.G.D.

Reference answered.

A. I. R. (35) 1948 Lahore 194 [C. N. 51.]

MAHAJAN J.

Municipal Committee, Amritsar v. Dhanpat Rai.

Second Appeal No. 2554 of 1945, Decided on 2-5-1947, from decree of Senior Sub-Judge, Amritsar, D/-10-8-1945.

Punjab Municipal Act (3 [III] of 1911), S. 195 proviso (1) and S. 81—Amount of compensation under S. 195 proviso (1) if can be recovered by coercive provisions of S. 81.

The amount of compensation offered by a person and received by the Municipal Committee under S. 195 proviso (1) cannot be described as a sum claimable by the Committee under the Act within the meaning S. 81. Proviso (1) to S. 195 does not authorise the Committee as of right to claim any sum by way of compensation from a person who has contravened the provisions of S. 195. The only power given to the Municipal Committee by the proviso is to accept a certain sum of money, if it is satisfied that it is sufficient, by way of compensation for the contravention of S. 195 but if no such sum is offered to or received by the Committee, the proviso does not come into play and the notice issued under S. 195 for demolition or alteration of the building is not exhausted. [Para 4]

Where on an application made by the person on whom notice under S. 195 had been served that he was prepared to pay compensation, the Municipal Committee decided to accept a certain sum as compensation but no occasion arose for its acceptance by the Committee as its payment was never offered, proviso (1) to S. 195 does not come into play at all and the amount determined by the Committee cannot be said to be claimable under S. 195, proviso (1) and cannot be recovered under the coercive provisions of S. 81. The Committee cannot by a unilateral decision fix the amount of compensation and then proceed to recover it under the provisions of Sec. 81. [Para 5]

Shamair Chand — for Appellant.

Bhagwan Das Mehra — for Respondent.

Judgment. — This second appeal arises out of a dispute between the Municipal Committee of Amritsar and one Dhanpat Rai. The facts of this case are few and simple. Nathu Mal father of the plaintiff built a house No. 548/11 within the limits of the Municipal Committee, Amritsar, with the sanction of the Committee. Nathu Mal died and the house came by inheritance to the plaintiff. The Committee sent a bill under S. 80, Punjab Municipal Act to the plaintiff on 25-3-1942 claiming from him a sum of Rs. 1242-4-0 as compensation assessed under the proviso to S. 195 of the Act. The bill was not respected and the Committee proceeded to recover the amount of the bill under the provisions of S. 81 of the Act. This action of the Committee led the plaintiff to institute the present suit for a perpetual injunction restraining the Committee from recovering the aforesaid amount from him under the provisions of S. 81 of the Act. It was alleged that no compensation could be recovered by the Committee from the plaintiff because he had made no application for composition under S. 195, Punjab Municipal Act, that the amount of compensation, even if due, could not be recover-

ed under the provisions of S. 81, Punjab Municipal Act, that the sanction given by the Committee had not been infringed in any way in building the house, and that the notices issued by the Committee were invalid, illegal and irregular.

[2] The suit was contested by the Committee on the ground that the civil Courts had no jurisdiction to entertain it and that the amount of compensation was assessed at the request of the plaintiff's father and that for this reason the notices issued to the plaintiff and the demands made from him were perfectly regular.

[3] The trial Judge held that the civil Courts had jurisdiction to try the present suit and that the amount of compensation claimed by the Committee had been assessed on the application made under S. 195, Punjab Municipal Act by the plaintiff's father on account of his having built in contravention of the sanction of the Committee. It was, however, found that the amount for which the bill was sent to the plaintiff was not such, recovery of which could be made under the summary provisions of S. 81, Punjab Municipal Act. In the result, the plaintiff's suit was decreed and an injunction was issued against the Committee restraining it from taking any steps for recovery of the amount mentioned above. The decision of the learned trial Judge was maintained on appeal by the Senior Subordinate Judge, Amritsar. The Committee has now preferred an appeal to this Court against the decision of the lower appellate Court.

[4] The question for decision in this case lies within a very short compass. The point is whether under proviso 1 to S. 195, Punjab Municipal Act the Committee is entitled to recover the amount of compensation mentioned in that proviso by the coercive provisions of S. 81, Punjab Municipal Act. The section and the relevant proviso are in these terms :

"195. Should a building be begun, erected or re-erected

- (a) without sanction as required by S. 189 (1) ; or
- (b) without notice as required by S. 189 (2) ;

(d) in contravention of the terms of any sanction granted ; or

(f) in contravention of any bye-law made under S. 190 ;

the committee may by notice to be delivered to the owner within six months from the completion of the building require the building to be altered in such manner as it may deem necessary, within the period specified in such notice :

Provided that the committee may, instead of requiring the alteration or demolition of any such building, accept by way of compensation such sum as it may deem reasonable."

On a plain reading of the section it means that instead of demolishing the building or requiring

it to be altered, the Committee can receive a certain amount of money by way of compensation from the person who has acted in contravention of the provisions of this section. If a sum is paid to the Committee which it deems reasonable by way of compensation by such a person and the Committee accepts that amount from him, it is then and then alone that the notice given by the Committee stands waived but if no amount is actually paid or is received by the Committee by way of compensation, the notice issued by the Committee cannot be said to have been abandoned or withdrawn. On that interpretation of the section the provisions of S. 81, Punjab Municipal Act, can hardly have any application to a case arising under this proviso. This section is in these terms :

"Any arrears of any tax, water rate, rent, fee or any other money claimable by a committee under this Act may be recovered on application to a Magistrate having jurisdiction."

The amount of compensation offered by a person and received by the Committee cannot be described as a sum claimable by a committee under this Act. The proviso to S. 195 does not authorise the Committee as of right to claim any sum by way of compensation from a person who has contravened the provisions of S. 195 of the Act. For instance, the committee cannot issue notice to such a person to the effect that he has contravened the provisions of the Act, and should pay compensation in a certain sum. It does not lie in the Committee's discretion to issue a notice to the effect that it has decided to recover a certain sum from him and that unless he pays that sum it will be recovered from him under the coercive machinery of the Punjab Municipal Act. The only power given to the Committee here is to accept a certain sum of money if it is satisfied that it is sufficient, by way of compensation for the infringement of S. 189 but if no such sum is offered to or received by the Committee, this proviso does not come into play and the notice issued for demolition or alteration of the building is not exhausted.

[5] In the present case, no sum was ever offered by the plaintiff or his father to the Committee and none was accepted by the committee. The father of the plaintiff, according to the findings of the Courts below, made an application that he was prepared to pay compensation. The amount was not determined by the Committee during his lifetime. After his death the Committee determined that the amount of compensation that it considered reasonable was a sum of Rs. 1242-4-0, but no occasion arose for the acceptance of this sum as its payment was not offered by the plaintiff. That being so, no amount was claimable by the Committee under

this section and none could be recovered under the coercive provisions of S. 81. The trial Judge as well as the learned Judge of the lower appellate Court took the view that the proviso contemplates a contract between the Municipal Committee and the person who has contravened the provisions of S. 195 of the Act. Mr. Shamair Chand, the learned counsel for the Committee, urged that this was not the true construction of the section. It is not a case where the person committing the infringement is entering into a contract with the Committee under the Contract Act. This contention of the learned counsel seems to have force but from this it does not follow that the Committee can by its unilateral decision fix the amount of compensation and then proceed to recover it under the provisions of S. 81 of the Act. In my judgment, therefore, as no amount by way of compensation as determined by the Committee was offered by the plaintiff, it could obviously not receive or accept any such amount and that being so, the proviso to S. 195 never really came into play. The position, therefore, remains as it was when the notice was issued by the Committee. In this appeal I am not in any way deciding what defences, if any, would be open to the plaintiff if the notice which was kept in abeyance when enquiries about the amount of compensation were going on is revived by the Committee.

[6] For the reasons given above I am of the opinion that the Court below rightly decreed the plaintiff's suit and restrained the Committee from proceeding under S. 81, Punjab Municipal Act for recovery of the amount of Rs. 1242-4-0 which it considered to be a reasonable compensation for waiver of the notice of demolition issued under S. 195 of the Act. The result, therefore, is that this appeal fails and is dismissed with costs.

G.N.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 195 [C. N. 52.]

BHANDARI AND ACHHRU RAM JJ.

Mt. Bachint Kaur — Defendant — Appellant v. Karam Chand — Plaintiff — Respondent.

Second Appeal No. 2050 of 1945, Decided on 18-6-1947, from decree of Dist. Judge, Jullundur, D/- 20-6-1945.

(a) Civil P. C. (1908), S. 11—Co-plaintiffs—Contest between them on issue must be necessary for decision of suit.

As between parties arrayed on the same side in the previous litigation, whether as co-plaintiffs or as co-defendants, a matter can be *res judicata* only if in the previous suit there was a matter directly and substantially in issue between the co-plaintiffs or the co-defendants and an adjudication upon that matter was necessary to the determination of the suit. Unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard to

which contest, is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as *res judicata* between them or between parties claiming through or under them in any subsequent suit. [Para 4]

P and his uncle *C* brought a suit to set aside a sale of property by collateral of *C*. The sale was set aside on the ground that the land was ancestral *qua P*. In a subsequent suit between *P* and *D*, the daughter of *C*, who had meanwhile died, the question was whether the land, the subject-matter of the previous suit, was ancestral property *qua P* or as contended by *D*, the self-acquired property of *C* :

Held, that the finding that the land was ancestral *qua P* arrived at in the previous suit was not *res judicata* in the subsequent suit, because *P* and *C*, through whom *D* claimed were arrayed as co-plaintiffs, and there was no contest between them on the points, the decision on which was unnecessary for the decision of the previous suit: 25 A. I. R. 1938 Lah. 571, *Dissent.*; 21 Mad. 8, *Expl.* [Para 7]

Annotation:—('44-Com) Civil P. C. S. 11, N. 46, 47.

(b) Civil P. C. (1908), S. 11 — Scope — Section is not exhaustive of circumstances under which *res judicata* may be applied—But when case falls within purview of section all requirements of section must be complied with.

It is true that S. 11 is not exhaustive of circumstances under which the principle of *res judicata* may be applied and that the principle may be applicable to a case which does not fall within the four corners of that section. But it is of the essence of a code to be exhaustive on all matters with which it deals and where a case does fall within the purview of S. 11, then all the requirements of that section must be complied with before the rule of *res judicata* can be held to be applicable. The principles of *res judicata* independently of S. 11 have been applied to proceedings other than suits and to decisions given at different stages in the same suit. But where the question has arisen whether the decision given in a previous suit about a particular matter should operate as *res judicata* in a subsequent suit in which the same matter is directly and substantially in issue, the rule of *res judicata* has not been applied if all the requirements of the section are not fulfilled: 25 A. I. R. 1938 Lah. 571, *Commented upon*; 3 A. I. R. 1916 P. C. 78, *Expl.* [Para 4]

Annotation:—('44-Com) Civil P. C., S. 11 N. 3.

Cases referred.—

1. ('38) 25 A. I. R. 1938 Lah. 571 : 178 I. C. 302, Ram Bhaj v. Ahmad Said Akhtar Khan.
2. ('16) 43 Cal. 694 : 3 A. I. R. 1916 P. C. 78 : 43 I. A. 91 : 33 I. C. 914 (P. C.), Sheoparsan Singh v. Ramnandan Prasad Singh.
3. ('98) 21 Mad. 8, Krishnan Nambiar v. Kannan.

Harnam Singh and Narindar Singh

— for Appellant.

Som Datta Bahri — for Respondent.

Achhru Ram J. — This judgment will also dispose of R. S. A. No. 2051 of 1945. These appeals have arisen under the following circumstances. One Chanda Singh a Jat of the village Bilga in Tahsil Phillaur, District Jullundur, gifted the whole of his landed property in favour of Mt. Bachint Kaur, his daughter. The mutation in respect of this gift was attested on 14-6-1941. Before the attestation of the mutation on 24-3-1941, Karam Chand, son of Chanda Singh's brother Narain, brought a suit for a declaration to the effect that the gift made by the aforesaid

Chanda Singh in favour of Mt. Bachint Kaur should not affect his reversionary rights after the donor's death. While this suit was pending Chanda Singh died on 7-9-1941 and the plaintiff converted his suit into one for possession. The suit was founded on the allegations that the land gifted was ancestral in the hands of Chanda Singh *qua* the plaintiff, that being the real nephew of the aforesaid Chanda Singh the plaintiff was entitled to succeed to the ancestral land left by him in preference to Mt. Bachint Kaur, his daughter, that Chanda Singh had no right to make a gift of his ancestral property in favour of his daughter to the prejudice of the plaintiff, and that the said gift could not bind the plaintiff who was entitled to the possession of the entire land in dispute. The suit was resisted by Mt. Bachint Kaur mainly on the plea that the land which formed the subject-matter of the gift was not ancestral *qua* the plaintiff and that she being a better heir to the self-acquired property of her father than the plaintiff, the gift in her favour, being in the nature of an acceleration of succession, was valid and could not be contested by the plaintiff. The learned trial Judge held that only a 3/20th share in the land comprised in Khewat No. 1466, excepting the land in Khasra Nos. 11902/4454 and 4903 and 1/96th share of land comprised in Khasra Nos. 4556, 4562 and 4555 had been proved to be ancestral *qua* the plaintiff. The rest of the land was found not to have been proved to be ancestral. The gift in respect of the non-ancestral land was upheld while the gift on the ancestral portion of the land was held to be invalid. In the result, the plaintiff was granted a decree only for possession of the land that was found to be ancestral. The land which was found by the learned trial Judge to be ancestral *qua* the plaintiff was that which stood in the name of Buta, the common ancestor of the plaintiff and Chanda Singh donor, in the Record of Rights prepared at the Settlement of 1849. The rest of the land, which was found to be non-ancestral, fell under three categories: (a) land which was owned by Amin alias Hammi, an uncle of Chanda Singh, which it was found was purchased by the aforesaid Chanda Singh in the year 1896, (b) the land which was owned by Mohkam, one of the collaterals of Chanda Singh, who was an absentee and which land was held to have come to Chanda Singh, on abandonment by the aforesaid Mohkam, and (c) land which originally belonged to Gajju, another collateral of Chanda Singh, and was sold by the aforesaid Gajju and was subsequently recovered by Chanda Singh, and Karam Singh by bringing a suit against the vendee for setting aside the sale.

[2] The plaintiff feeling aggrieved from the decree of the learned trial Judge filed an appeal in

the Court of the learned District Judge. That learned Judge agreed with the decision of the learned trial Judge in respect of the land mentioned in cl. (a). He, however, came to a contrary conclusion with reference to the land mentioned in cls. (b) and (c). With regard to the land mentioned in cl. (b) he held that Mohkam had abandoned the land during the lifetime of Buta, the father of Chanda Singh and the grandfather of Karam Chand plaintiff, and that the land having devolved on the aforesaid Buta on such abandonment must be held to be ancestral in the hands of Chanda Singh. With regard to the land mentioned in cl. (c) it was held that the sale by Gajju was set aside on a suit brought by Chanda Singh and Karam Chand on the ground that the land sold by Gajju was ancestral in his hands *qua* the plaintiff and that the decision as to the land having descended from Sabta, the common ancestor of Gajju, Karam Chand and Chanda Singh, operated as *res judicata* in the present suit. The learned Judge accordingly held the land mentioned in cls. (b) and (c) also to be ancestral *qua* the plaintiff, and accepting the plaintiff's appeal he granted him a decree for possession of the whole of the land in suit excepting that mentioned in cl. (a) i. e., the land purchased by Chanda Singh from Amin *alias* Hammi. Both parties feeling aggrieved from the decree of the learned District Judge have filed separate appeals in this Court. The plaintiff's appeal is R. S. A. No. 2051 of 1945 whereas the appeal of the defendant is R. S. A. No. 2050 of 1945.

[3] The learned counsel for the defendant did not contest the finding of the learned District Judge as to the land mentioned in cl. (b). As regards the land mentioned in cl. (c) it was contended by him that Karam Chand and Chanda Singh being both arrayed as co-plaintiffs in the suit brought to set aside the sale by Gajju, any decision given in that suit with regard to the character of the land held by Gajju cannot operate as *res judicata* in the present case as between Karam Chand and the defendant who claims through and under Chanda Singh. After hearing the learned counsel for the parties I am clearly of the opinion that this contention of the learned counsel for the appellant is well-founded and must prevail.

[4] In order to attract the application of S. 11, Civil P. C., the parties to the suit, in which the plea of *res judicata* is raised, must have been arrayed in the previous suit on opposite sides either personally or through parties under whom they claim. As between parties arrayed on the same side in the previous litigation, whether as co-plaintiffs or as co-defendants, a matter can be *res judicata* only if in the previous suit there

was a matter directly and substantially in issue between the co-plaintiffs or the co-defendants and an adjudication upon that matter was necessary to the determination of the suit. It is well-settled that unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard to which contest is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as *res judicata* between them or between parties claiming through or under them in any subsequent suit. The authorities on this subject are collected at p. 63 of Mulla's Civil Procedure Code, 1941 edition, and include a large number of judgments of their Lordships of the Judicial Committee. Mr. Som Datt Bahri, the learned counsel for the respondent, drew our attention to certain observations in a judgment of a Division Bench of this Court in A. I. R. 1938 Lah. 571,¹ for a contrary view. In that case one Gobinda, whose son had predeceased him, leaving a widow Mt. Ganeshi, executed a will in favour of one Shiv Ram describing him as his adopted son. Matu and Indar, sons of Ram Bhaj, whose father Ram Bhaj was alive, collaterals of the aforesaid Gobinda, brought a suit for a declaration to the effect that Gobinda's will should not affect their reversionary rights after the death of Mt. Ganeshi. The suit was resisted by Shiv Ram *inter alia* on the plea that he as the adopted son of Gobinda was the next heir after his death. This plea was negatived by the Court and the suit of Matu and Indar was decreed. About the same time Mt. Shankari, the widow of Gobinda's nephew Ruldu, sold some land. A suit to avoid this sale was brought by Mt. Ganeshi, the widowed daughter-in-law of Gobinda and the aforesaid Shiv Ram, claiming as the adopted son of Gobinda. In this suit Shiv Ram was held not to have any *locus standi* to sue by reason of the previous decision negating his alleged adoption by Gobinda. In 1934 the aforesaid Mt. Shankari sold some other land. A suit to avoid this sale was brought by Ram Bhaj, father of Matu and Indar. The vendee pleaded *inter alia* that in the presence of Shiv Ram, the adopted son of Gobinda, a nearer collateral, Ram Bhaj had no *locus standi* to sue. The trial Judge repelled this plea on the ground that the question of the alleged adoption of Shiv Ram could not be re-agitated by reason of the decisions in the two previous cases. The learned District Judge, however, came to a contrary conclusion. On appeal the view of the learned trial Judge was upheld by a Bench of this Court. We are not in the present case concerned with the question whether on the facts the case was or was not correctly decided. Indeed, as I look at the

matter the issue as to whether Shiv Ram was or was not the adopted son of Gobinda was wholly unnecessary and irrelevant in that case. Even if Shiv Ram had been found to be the adopted son of Gobinda, the alleged adoption being no more than a mere customary appointment of an heir could not confer on him any right of succession to a collateral of Gobinda and could not clothe him with any right to contest the validity of an alienation by the widow of such a collateral. His presence, therefore, could under no circumstances be a bar to the maintainability of the suit brought by Ram Bhaj. It is true, however, that the judgment of the Bench did not proceed on this ground but on the ground of the previous decision as to the status of Shiv Ram operating as *res judicata*. I do not propose to express any opinion as to whether on the facts of that case the rule of *res judicata* could be applied, but in dealing with the question of *res judicata* Din Mohammad J., who wrote the judgment of the Bench, has made certain observations with which I feel bound to express my very respectful dissent. It is true that S. 11 is not exhaustive of the circumstances under which the principle of *res judicata* may be applied and that the principle may be applicable to a case which does not fall within the four corners of that section. However, it is well-settled that it is of the essence of a code to be exhaustive on all matters with which it deals and there is a long course of decisions in which it has been held that where a case does fall within the purview of S. 11, then all the requirements of that section must be complied with before the rule of *res judicata* can be held to be applicable. The principles of *res judicata* independently of S. 11 have been applied to proceedings other than suits and to decisions given at different stages in the same suit. I am not, however, aware of any case in which the question has arisen whether the decision given in a previous suit about a particular matter should operate as *res judicata* in a subsequent suit in which the same matter is directly and substantially in issue, and the rule of *res judicata* has been applied in spite of all the requirements of the section not having been fulfilled. In 43 Cal. 694,² to which reference has been made by Din Mohammad J. their Lordships of the Judicial Committee were dealing with the question whether a decision in proceedings under the Probate and Administration Act could not operate as *res judicata* in a subsequent suit between the parties relating to the same will. It is clear that S. 11, in terms did not cover that case because the previous proceedings were not in the nature of a suit. It was held that although the case did not fall within the purview of S. 11, the general principles of

res judicata were applicable and precluded the Court from giving a decision contrary to the one arrived at in the probate proceedings. With all respect I cannot see how the following observations made by the learned Judge can find any support from anything said by their Lordships of the Judicial Committee in the aforesaid judgment:

"It cannot be denied that an issue may be *res judicata* between co-plaintiffs as well as co-defendants, and although it is laid down in certain judgments that for an issue to be *res judicata* between co-plaintiffs, there must be a real contest between them, with all respect we are disposed to consider that when the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full fight."

[5] That a matter cannot be *res judicata* as between persons arrayed on the same side in the previous suit unless in that suit that matter was directly and substantially in issue between them and a decision with regard to it was necessary for the final determination of that suit is very well-settled and finds support from numerous judgments not only of the various High Courts but also of the Privy Council. I am not aware of any decided case in which the rule of *res judicata* may have been applied as between such parties except under the circumstances mentioned above. The discordant note struck by Din Mohammad J., I must say with all respect, is not supported either by principle or by authority. The judgment of Benson and Boddam JJ. in 21 Mad. 8,³ does not at all support his view and I am inclined to think that in fact it runs counter to it. In that case on 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession but failed on the ground that the vendor had no title. The plaintiff, a few years later, brought a suit to recover, with interest, the purchase money and the amount of costs incurred by him in the previous litigation. The suit was resisted mainly on the plea of bar of limitation which was negatived by the High Court. In referring to the question of title the following observations were made by their Lordships at page 10:

"The only other ground urged is that the lower Courts were wrong in deciding that the tarwad's title to the property was not a question to be gone into in the present suit, as it had been decided in the former litigation.

In that litigation the present plaintiff and defendant 2 (as representing the tarwad) were joint plaintiffs and it was then found as between each of them and the persons in possession of the property that defendant 2 and his tarwad had no title to the property. The title

to the property is therefore *res judicata* as between the persons in possession and defendant 2 and his tarwad. It is idle to contend that, in these circumstances, any useful purpose was, or could be, served by admitting evidence as to the tarwad's alleged title."

[6] It will be noticed that their Lordships did not hold that the decision on the question of title in the previous suit operated as *res judicata* as between the parties to the subsequent suit; it was held to operate *res judicata* only as between the persons in possession and defendant 2 and the tarwad. As regards the parties to the suit it was held that no useful purpose was or could be served by admitting evidence as to the tarwad's alleged title. The decision, therefore, proceeded on grounds of prudence and not on the principles of *res judicata*.

[7] With all deference, therefore, to the learned Judges who decided A. I. R. 1938 Lah. 571,¹ I hold that the learned District Judge is wrong in holding that the decision in the suit brought by the present plaintiff and the deceased Chanda Singh to avoid the sale by Gajju as to the nature of the land held by Gajju operates as *res judicata* in the present case. I may note here that the concluding portion of the passage cited by me above from the judgment of Din Mohammad J. clearly does not apply to this case because it cannot be said that the only person concerned in holding the opposite position, namely, Mt. Bachint Kaur or even Chanda Singh, her predecessor-in-title, had any fight on the question of the character of the land in the previous case.

[8] It was next urged that even if the decision in the present case could not operate as *res judicata*, Chanda Singh's admission in that suit as to the land held by Gajju having descended from Sabba shifted the burden of proof on to the defendant of proving that land to be otherwise than ancestral. This contention of the learned counsel has force. However, after a careful perusal of the excerpts filed by the Special Qanungo and the history of the foundation of the village, I am driven to the conclusion that the land which was held by Gajju could not be traced to Sabba. The admission made by Chanda Singh in the previous suit has, therefore, been proved to be wrong and cannot benefit the plaintiff in any manner.

[9] For the reasons given above, I disagree with the view taken by the learned District Judge as to the land mentioned in cl. (c) and set aside his finding in respect of that land.

[10] The learned counsel for the plaintiff made a feeble attempt to contest the concurrent findings of the Courts below with regard to the land mentioned in cl. (a). However Ex. D-2, a copy of the mutation order dated 9th April 1886, clearly shows that Amin sold his land to Chanda Singh. In the Jamabandi for 1896-97, that land

was shown as the property of Chanda Singh. If by some subsequent arrangement the whole of the land came to be recorded as the property of Karam Chand and Chanda Singh in equal half shares he cannot take away the effect of the original acquisition made by Chanda Singh. I must, therefore, hold that the land mentioned in cl. (a) has been rightly held by the two Courts below to be the self-acquired property of Chanda Singh.

[11] For all the reasons given above, I would dismiss the plaintiff's appeal, namely, R. S. A. No. 2051 of 1945. I would allow the appeal of the defendant, namely, R. S. A. No. 2050 of 1945 to the extent of excluding from the decree passed in the plaintiff's favour the land mentioned in cl. (c), namely, the land which Chanda Singh acquired by means of the suit brought by him along with Karam Chand to set aside the sale by Gajju. In all other respects the decree of the learned District Judge is maintained. In respect of the land coming from Gajju, however, the decree of the learned trial Judge dismissing the plaintiff's suit is restored. In the circumstances of the case I would leave the parties to bear their own costs throughout in both the appeals.

[12] Bhandari J.—I agree.

R. G. D.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 199 [C. N. 53.]

MAHAJAN J.

Parbhu—Plaintiff — Appellant v. Shamsud Din and another — Defendants — Respondents.

Second Appeal No. 1708 of 1945, Decided on 14-5-1947, from decree of Senior Sub-Judge, Ambala, D/- 17-5-1945.

(a) Punjab Pre-emption Act (I [I] of 1913), S. 15 (c)—Question whether sub-division was recognised sub-division of village—Question how to be determined stated.

In order to determine for the purpose of the Pre-emption law, whether a particular Patti or a sub-division of a Patti was a recognised sub-division of a village in the true sense of that term reference must be made to the *Kaifiyat-i-dehi* of the village and it should be ascertained whether the sub-division of the village was between various branches of one family or whether these sub-divisions were made by the revenue authorities for fiscal purposes only. The subsequent history of ownership in the sub-divisions is not the determining factor in order to find whether the sub-divisions when originally founded were homogeneous in descent as well as in area: Second Appeal No. 1396 of 1944, *Foll.*; 169 P. R. 1889; Civil Appeal No. 518 of 1902; 1 A. I. R. 1914 Lah. 335 and 1 A. I. R. 1914 Lah. 255, *Ref.* [Para 7]

(b) Civil P. C. (1908), S. 100 — Finding on question of fact — Finding when can be challenged in second appeal.

The finding on the question whether a particular sub-division of a village is a recognised sub-division for the purposes of the Pre-emption law is a finding on a question of fact; but if the finding is vitiated by reason of the fact that the Courts below failed to apply

the correct principles applicable for the determination of the question and failed to take into consideration the only material document that was produced in the case, the finding can be challenged in second appeal.

[Para 10]

Annotation : ('44-Com.) Civil P. C., S. 100, N. 51, Pt. 16 and N. 53, Pt. 3.

Cases referred :—

1. ('89) 169 P. R. 1889, Bhagat Hira Nand v. Lal Khan.
2. ('14) 60 P. R. 1914 : 1 A. I. R. 1914 Lah. 335 : 23 I. C. 151, Basawa Singh v. Natba Singh.
3. ('15) 21 P. R. 1915 : 1 A. I. R. 1914 Lah. 255 : 26 I. C. 433, Waryam Singh v. Mahtab Singh.

Asa Ram Aggarwal and M. Arjandas — for Appellant.

Ghulam Mohyuddin — for Respondents.

Judgment.—On 25-6-1943, defendant 1 Rustam Ali sold the land in suit to defendant 2 Shams-ud-Din for an ostensible consideration of Rs. 4000. Out of the land sold khasra No. 1442, 9 bighas and 9 biswas in area, is situate in Zail Shamilat Jagirdaran. In respect of this area the plaintiff Prabhu brought the suit out of which this appeal arises for possession of the land by pre-emption on payment of Rs. 1120. He alleged that he was an owner in the said Zail while the vendee was not an owner in that Zail. The vendee contested the suit and denied that there was any sub-division in this village as Zail Shamilat Jagirdaran. He further pleaded that the market value of this Khasra number was not less than Rs. 2000. On the pleadings of the parties two material issues were framed : (1) Whether there are sub-divisions in this village and Zail Shamilat Jagirdaran is such a sub-division for purposes of pre-emption ? (2) Whether the defendant vendee is also an owner in Zail Shamilat Jagirdaran, if any ?

[2] The trial Judge held that there are recognised sub-divisions in this village and Zail Shamilat Jagirdaran is one of those sub-divisions for purposes of pre-emption. He also held that the vendee was not an owner in the Zail while the plaintiff was an owner in Zail Shamilat Jagirdaran and was a Lambardar. In the result a decree was granted to the plaintiff for possession of the suit land by pre-emption on payment of Rs. 1120. The vendee Shams-ud-Din appealed to the Court of the Senior Sub-Judge, Ambala. The learned Senior Subordinate Judge disagreed with the decision of the trial Judge on issue No. 1 and held that there was no homogeneity of area or of descent in the Zails of this villages and that for purposes of realisation of land revenue different Lambardars were appointed and Zails were constituted. In his opinion they did not constitute recognised sub-divisions of the village. It was also observed that the tenure of the village was bhaya-chara ghairmukamil and as possession was the measure of right, the question of inclusion of strangers into the various Zails did

not arise. In the result the vendee's appeal was allowed and the plaintiff's suit was dismissed with costs throughout. Plaintiff has now appealed to this Court.

[3] The sole point for determination in the appeal is whether the Zails in village Sohana constitute separate sub-divisions of the village for purposes of pre-emption. From time to time in the Punjab Chief Court and in this Court an attempt has been made to lay down a test for the determination of this matter and it has been ruled that there should be homogeneity of descent and area before it can be held that a particular portion of a village constitutes a separate subdivision for purposes of the Punjab Pre-emption Act. It has also been ruled that if a certain area of a village is demarcated and given a particular name merely for fiscal purposes and collection of land revenue, then such an area does not constitute a sub-division of the village for the purposes of the Punjab Pre-emption Act. In 169 P. R. 1889¹ it was said that

"there is nothing in S. 12, Punjab Laws Act, which leads us to believe that the term 'sub-division' in cls. (c) and (d) is to be construed with reference to any particular principle of division. All that is necessary to show to bring a case within the above clauses, is that the village is divided into recognised sub divisions, and it is shown by the Patwari's evidence, and the other evidence in this case, that Rawalpindi is so divided, and that the boundaries of the *taraf* are entered in the Settlement Record."

[4] In Civil Appeal No. 518 of 1902 it was held that

"in village Pheru Shebar, Tahsil Ferozepur, *sails* into which a *patti* was sub-divided were not subdivisions of the village for the purposes S. 12 (c), Punjab Laws Act, as a reference to the history of the village and the Settlement Record showed that the *sails* in question were constituted by mere arbitrary grouping together of certain holdings, so as to form an association of proprietors, with no connecting ties of any great sort. Within the *sails* there was no measure of rights other than actual possession, and the village as a whole was classed in the record as Bhaia Chara."

The learned Judges observed that "no rule of universal application can be laid down as to what constitutes the village sub-divisions for the purposes of pre-emption law," and they were of opinion that

"there must be some one or more well-defined attributes to justify treatment of a section of a village as sub-division and in determining the point, the first thing to be looked to is the history of the village so far as it can be ascertained from the Settlement Record."

[5] In 60 P. R. 1914² it was held that each of the two *thullas* in Patti Jattan had a separate Shamilat *thulla* in which the proprietors of the other *thulla* had no share, and that each *thulla* was entered in and authenticated by the Settlement Record. On the basis of this finding it was held that the *thullas* were separate sub-divisions of the village for the purposes of the Punjab Pre-emption Act.

[6] In 21 P. R. 1915³ at p. 125 of the Report it was stated as follows :

"The law of pre-emption as applicable to village communities was intended primarily, at all events, to protect the village against the intrusion of strangers who might otherwise obtain a footing in it contrary to the wishes of the community who were bound to each other by ties of descent, and would resent the advent of an intruder. This principle can obviously have no application when the village is of but recent foundation and is composed of individuals whose sole connection *inter se* is that each has been selected by Government as a person to whom a grant of land might fitly be made."

[7] Recently in Regular Second Appeal No. 1396 of 1944 sitting with the learned Chief Justice I followed the rule laid down in 21 P. R. 1915³ and it was held that in order to determine whether a particular Patti or a sub-division of a Patti was a recognised sub-division of a village in the true sense of that term reference must be made to the *kaifiyat-i-dehi* of the village and it should be ascertained whether the sub-division of the village was between various branches of one family or whether these sub-divisions were made by the revenue authorities for fiscal purposes only. It seems to me that the two Courts below have failed to examine the present case in the light of the decision mentioned above. The *kaifiyat-i-dehi* which is the all important document to determine the nature of the foundation of the zails has entirely been overlooked by them. They have placed reliance merely on the present constitution of these zails. It is true that as at present constituted the zails of village Sohana have ceased to represent homogeneity of descent. Even before the year 1852, strangers had been allowed entrance in the various zails and measure of right by mutual consent between the proprietors had become possession rather than ancestral shares but the subsequent history of ownership in these zails is not the determining factor in order to find whether the zails when originally founded were homogeneous in descent as well as in area.

[8] It is now convenient to consider the all important document which states the history of the foundation of these zails in village Sohana. This is Ex. P-3 and it states as follows :

"We the owners who belong to the Rajput Chuban tribe, both Hindus and Musalmans, are descended from a common ancestor Sangu. He broke the area of this village from waste jungle and occupied it as an owner. The founder had two sons, one a Hindu and the other a Muslim. Subsequently the descendants of the founder multiplied and they divided the village area into 96 ploughs. The descendants of the Muslim son of the founder got half the land — this was measured by 48 ploughs—and an equal share was taken by the descendants of the Hindu son of the original founder. One Patti in the village was known as Patti Musalmanan and the other Patti was known as Patti Hinduan. These Pattis were known after the two sons of the founder and were exclusively owned by their

descendants at one time. The area of these two Pattis formed a compact area of the village. At the time of the partition the Patti Musalmanan was subdivided into three Zails, Zail Bari, Zail Chhoti and Zail Khairpurian. Fifteen ploughs land was allotted to one Zail, 13 ploughs land to the other and 19 ploughs land to the third. Patti Hinduan was subdivided into three Zails. Zail Achhar Singh — Kehr Singh was given 12 ploughs land, Zail Deva Singh was allotted another 12 ploughs land and Zail Shamilat Jagirdaran was allotted 24 ploughs of land."

It is further said that since the time of partition these Zails exist, that since the advent of the English the measure of right in the various Zails has become possession and that certain other tribes have been allowed to enter the village owing to relationship, charitable gifts or other causes. It is clear from a perusal of the history of foundation that the Zails as originally founded were owned by the descendants of Sangu. It is in the evidence of the Patwari that the lands of these Zails are compactly situated except that some fields which are situated on the border of the Zails may be said to be intermixed. It is clear, therefore, that the Zails of this village were founded a considerable time before the advent of the British and when so founded were held by the descendants of one common ancestor who were connected with each other by ties of descent and their area was compact. In these circumstances, in view of the decisions cited above, it should have been held that Zail Shamilat Jagirdaran was a recognised sub-division of village Sohana and the plaintiff as an owner in the Zail was entitled to maintain the pre-emption suit and get the land in preference to the vendee who owned no land in this Zail. As I have already pointed out the subsequent devolution of the lands in these Zails after they had been founded is not material for the purposes of determining whether they constitute recognised sub-divisions of the village or not. It is quite clear that these Zails were not demarcated by the revenue officers for fiscal purposes, that is, for the purpose of realisation of land revenue. On the other hand, at the original partition of the village between the descendants of the common ancestor they were founded on the basis of homogeneity of descent.

[9] On behalf of the respondent it was argued that even in the year 1852 certain strangers had been admitted into these Zails and that each of the Zails was not holding a separate area of Shamilat. Some of the zails have a separate area of Shamilat appurtenant to them while the others have not got any area of shamilat appurtenant to them. But this does not determine the matter one way or the other. Similarly, the admission of strangers into these Zails or into the Pattis a considerable time after they came into existence is immaterial for a finding whether

they constitute a recognised sub-division for the purposes of the pre-emption law or not.

[10] Lastly, it was urged that the finding of the lower appellate Court was one of fact and could not be challenged in second appeal. It is true that the finding on the question whether a particular sub-division of a village is a recognised sub-division for the purposes of the pre-emption law is a finding on a question of fact but in this case the finding is vitiated by reason of the fact that the Courts below failed to apply the correct principles applicable for the determination of the question whether a particular sub-division of a village is or is not a recognised sub-division for the purposes of the Punjab Pre-emption Act. They also failed to take into consideration the only material document that was produced in the case, namely, the history of the foundation of the village prepared in 1887-88.

[11] For the reasons given above, I allow the appeal, set aside the decision of the learned Senior Subordinate Judge and restore the decree granted to the plaintiff by the trial Court. In the circumstances I leave the parties to bear their own costs throughout.

[12] If the amount of the price deposited by the plaintiff has been withdrawn after the decision of the Senior Subordinate Judge, he should redeposit the amount in Court on or before 15.6.1947 failing which his suit will stand dismissed.

V.R.

Appeal allowed.

A. I. R. (35) 1948 Lahore 202 [C. N. 54.]

MAHAJAN J.

Kishan Chand — Petitioner v. Divisional Supdt., Lahore, Dvn., North Western Railway — Respondent.

Civil Revn. No. 27 of 1946, Decided on 12-5-1947, from order of Dist. Judge, Lahore, D/- 30-11-1945.

Payment of Wages Act (1936), S. 15 (3) — Unjustifiable reversion of workman — Jurisdiction to interfere.

The Act furnishes a summary remedy for wages earned in an office and not paid but it does not provide a remedy for investigation of queries which concern the office itself, in other words, whether a man should be retained in one job or should be reverted to another job. Cases of unjustifiable reversion cannot be decided by the authority appointed under the Act exercising jurisdiction under S. 15 (3).

Petitioner in person.

Narainjan Singh — for Respondent.

Order. — This application in revision was admitted because a similar question as the one involved here was pending decision of this Court in C. R. No. 359/43. That application has been decided by my brother Ram Lal on 25th March 1946, and has been dismissed and this application is now ripe for decision.

[2] The applicant Kishan Chand who was working as Boiler Maker, Loco Shed, N. W. R.

on daily wages of Rs. 2-8-0 on the date of the application was promoted as a Boiler maker journey-man in the grade of Rs. 100-10-170 on 6th December 1942 and worked in that capacity till 21st March 1944. He got an increment of Rs. 10 when working in that grade. He was then reverted to this original job. He contended that his reversion and reduction was *ultra vires* of the Payment of Wages Act. On this ground he claimed a sum of Rs. 210 and compensation, computing the deduction at Rs. 35 P. M. for a period of six months.

[3] The respondent denied the claim and pleaded that the promotion of the applicant was purely temporary and that as soon as a more suitable man was found he was reverted to his substantive job. The jurisdiction of the Court to question the decision regarding applicant's reversion was contested.

[4] The Commissioner appointed under the Payment of Wages Act dismissed the application on the finding that the application was not maintainable inasmuch as the authority appointed under the Act could not interfere with the decision that the applicant was no longer to hold the position to which he had been promoted temporarily and that this is not a case of reduction of wages contemplated by the Payment of Wages Act, S. 15 (3). On appeal the learned District Judge maintained this decision. He held that the applicant was getting the wages for the job he was now doing. His contention that he had been unjustly reverted and against the terms on which he had been promoted were matters outside the scope of the enquiry under S. 15 (3).

[5] In this application in revision the arguments taken before the learned District Judge were reiterated. It was said that the applicant was promoted till such time that a suitable permanent incumbent for the office was found and contrary to that term he had been reverted and that therefore the case was one for decision under S. 15 (3), Payment of Wages Act. I am unable to accede to this contention. The Act furnishes a summary remedy for wages earned in an office and not paid but it does not provide a remedy for investigation of queries which concern the office itself, in other words whether a man should be retained in one job or should be reverted to another job. Cases of unjustifiable reversion in my view cannot be decided by the authority appointed under Payment of Wages Act exercising jurisdiction under S. 15 (3). The view taken by the Courts below is correct and I accordingly dismiss the application but will make no order as to costs.

D.S.

Application dismissed.

A. I. R. (35) 1948 Lahore 203 [C. N. 55.]

MOHAMMAD SHARIF J.

Aftab Rai — Appellant v. Collector, Lahore and another — Respondents.

First Appeal No. 35 of 1946, Decided on 28-5-1947, from order of Dist. Judge, Lahore, D/- 30-11-1945.

(a) Defence of India Rules (1939), R. 75A — Requisition of land — Average prices of land how to be determined.

In order to have the average prices of five years' sales of land the period to be taken into calculation should be anterior to the acquisition of land in question and not subsequent to it. [Para 2]

(b) Defence of India Rules (1939), R. 75A — Temporary acquisition of land — Mode of determining compensation.

Where land is acquired for a time or for a certain period as the case may be, the real question for determining the compensation to be paid in respect of it is what was the amount of rent at which the plot of land could be let out by the owner acting at his own will and without compulsion. The calculation of rent on the basis of first finding out the market value of the property may not be proper in all cases. It might afford a good guide where the property is situated in a very important part of the town or is otherwise a trade centre, but the same criterion cannot hold good in the case of land which might be lying at a little distance from the *abadi* and was not built upon or could not be easily built upon for some years to come: 33 A.I.R. 1946 Cal. 416, *Disting.* [Para 3]

Case referred :—

1. ('46) 33 A. I. R. 1946 Cal. 416 : 227 I. C. 117, Province of Bengal v. Board of Trustees for the Improvement of Calcutta.

*Yeshpal Gandhi — for Appellant.**Basant Krishan for Advocate-General*

— for Respondents.

Judgment. — On 10-8-1942, Government requisitioned an area of land measuring 136 kanals and 6 marlas belonging to the appellant under R. 75-A, Defence of India Rules. The owner demanded Rs. 8 as rent per kanal per annum. The Collector awarded only Rs. 2. The District Judge of Lahore was appointed an arbitrator under S. 19, Defence of India Act, to ascertain the amount of compensation that should be paid to the owner for the requisition of the land in dispute. The arbitrator found that Rs. 1000 per kanal was the fair market value of the property and allowed Rs. 2 per cent. on it as rent, that is, he allowed Rs. 20 per kanal. The owner feels dissatisfied with it and has come up in appeal.

[2] It is contended by the learned counsel for the appellant that the value of the land per kanal as ascertained by the arbitrator is too low and in any case he should have been given at the rate of 4 per cent. per annum as rent. The appellant claimed that the entire land was worth about Rs. 25,000. As already observed, the learned District Judge found only Rs. 1000 per kanal as the fair price at which the land was available in that locality. There is no reliable evidence as to

the actual price at which this land or the land in the neighbourhood was available at the time of the requisition order. It is not disputed that the price prevailing at the time the land was requisitioned should alone be taken into consideration. The oral evidence is not of high value. P. W. 1 deposed that he had in April 1945 purchased land at the rate of Rs. 3600 per kanal. P. W. 2 is a dealer in property and he stated that in June 1943 he had offered for this land at the rate of Rs. 3000 per kanal which, however, was not accepted by the owner. There is some documentary evidence to indicate the price at which the lands in the neighbourhood were sold some years before or after the requisition order. P. W. 6 refers to the acquisition by the D. A. V. College Committee on 27-11-1939 of an area of two kanals and eight marlas for Rs. 5000. Similarly, the D. A. V. College purchased 51 kanals and 14 marlas of land for Rs. 72,380 on 5-12-1939. The former plot of land abuts on the Jail Road where there are several residential houses and where there has been and there shall be a fair extension of residential houses. As to the latter the land is described as situated in village Ichhara and is canal irrigated. The record is silent as to the distance of this land from the one in dispute. As many as nine mutations were brought on the record by the Patwari to show the price at which lands have been sold in that locality. The first four mutations ranged between August 1941 and March 1942 and the average price works out to Rs. 222 per kanal. The other two mutations relate to sales in February 1943 and in June 1943. The average price comes to Rs. 328 per kanal. The remaining three mutations relate to the year 1944 and their average is Rs. 1125 per kanal. The learned District Judge has on a consideration of this material come to the conclusion that Rs. 1000 per kanal would represent the fair market value of one kanal of land. I may add here that in order to have the averages of five years' sales of land the period to be taken into calculation should have been anterior to the transaction in suit. In other words, it was proper that the averages of five years' sales should have been taken before August 1942 and not in the manner in which it was done in the present case. It is a matter of common knowledge that the prices of land have considerably appreciated after 1942 and in the year 1944 onwards in some cases the prices have gone up as many as five to ten times. If the sales from August 1942 to June 1943 be alone taken into calculation the average price would not exceed Rs. 275 per kanal. It should not be overlooked that the land which was requisitioned by the Government is banjar qadim and was not being used for any purpose beyond the site of huts for the labourers who

were working under the appellant in a factory known as Ganga Ice Factory. On this material, I have no hesitation in saying that there was no reliable data to determine the fair value at which the land was likely to be sold in open market, but it may be safely added that the learned District Judge has fixed the price not at a low figure but at a high figure and as there is no counter-appeal it may be taken to be correct for our present purposes.

[3] The main argument addressed on behalf of the appellant is that he should be allowed four per cent. by way of rent of the value of the land ascertained by the lower Court. I do not find that it was ever made an inflexible rule that in the case of temporary acquisitions four per cent. or five per cent. should be allowed in every case. My attention was invited to A. I. R. 1946 Cal. 416.¹ In that case it was out and out acquisition by the Government. It was found that "the province of Bengal requisitioned a large area of land in what may be termed the Lake Area, one of the beauty spots in the town of Calcutta." It was further found that "some of the lands of the northern block had been fully developed as building sites and were ready for sale at the dates of the requisitions and the others had also been plotted as building sites to which access roads had been made, but the roads had not been metalled or sewered and no water and gas mains had been laid out, and those works could not be completed for lack of materials on account of war conditions." In view of all the circumstances, it was held that the "compensation in the shape of monthly rent calculated at five per cent. on the market value of the land" was not excessive. The requisition as pointed out in that ruling is the "acquisition of an interest in land for a time or for an uncertain period as the case may be." To my mind, the real question for consideration in this case is what was the amount of rent at which this plot of land could be let out by the owner acting at his own will and without compulsion. The calculation of rent on the basis of first finding out the market value of the property may not be proper in all cases. It might afford a good guide where the property is situated in a very important part of the town or is otherwise a trade centre, but the same criterion cannot hold good in the case of land which might be lying at a little distance from the *abadi* and was not built upon or could not be easily built upon for some years to come. The land in suit, as observed, is banjar qadim and as such has not been brought under cultivation for a pretty long time. It is removed by 500 karams from the main road itself. The mere fact that it could at some future time be used as a factory area would not mean that it

was capable of yielding rent to the same extent as the vacant site inside the factory of the appellant was yielding. P. W. 3, P. W. 4 and P. W. 5 are the persons, who have taken on lease a part of the land situated inside the Ice Factory. They were paying rent at the rate of more than Rs. 50 per kanal. Two of them have built their own factories inside the premises of the Ice Factory and the third one was using it as a godown. The rent that they were paying would not be a fair basis for finding out the proper amount of rent that should have been paid about the land requisitioned by the Government. Their evidence was therefore justly considered as not of any value. The factory abuts on the Jail Road and these persons enjoy the fullest advantages which are open to a factory owner or to another dealer whose workshop or premises is situated on the main road. There is, however, another important piece of evidence on the record which deserves much weight. There is a big area of land belonging to the D. A. V. College Committee adjacent to the one in suit. From the statement of the patwari Sube Khan, it is evident that this area measuring 1223 kanals and 14 marlas comprising 733 kanals and 3 marlas of Nehri land, 13 kanals and 18 marlas harani, 20 kanals and 13 marlas banjar jadid, 65 kanals and 2 marlas banjar qadim and ghair mumkin 90 kanals and 18 marlas was leased out to Dr. Pran Nath for Rs. 2506-14-0 per annum. This works out to Rs. 2-1-0 per kanal per annum. The major portion of this area is canal irrigated and is capable of producing crops. If this could be leased out at the rate of Rs. 2-1-0 per kanal in 1938 and 1939, surely the rent in 1942 had not gone up to as much as 25 times or more which the appellant claims. There has been some increase since then no doubt, but not what is claimed by the owner. The learned District Judge has allowed him almost ten times as much and there is nothing to show that this is inadequate. The learned District Judge did not accept it as the correct basis of his award as "this was probably for agricultural purposes and the lease was taken long before the date of requisition." The fact that it was taken for agricultural purposes would not detract from the value of this land but it would be a relevant consideration for thinking that the land must be of a superior quality which may be used at a greater advantage than the one in dispute. I, however, agree with him that the lease in 1938-39 may not represent the correct rental value in 1942, but there is no material before me to prove that it has increased to more than ten times. Under the circumstances, I think that the learned District Judge has already dealt with the appellant in a fairly liberal manner and the appellant is not justly entitled to claim more.

[4] For the reasons given above, I would dismiss this appeal with costs.

K.S.

Appeal dismissed.

A. I. R. (35) 1948 Lahore 205 [C. N. 56.]

CORNELIUS J.

Fazal Elahi—Judgment-debtor—Appellant v. Diwan Chand—Decree-holder—Respondent.

Second Appeal No. 894 of 1945, Decided on 9-5-1947, from order of Senior Sub-Judge, Gujranwala, D/-28-2-1945.

(a) Indian Soldiers (Litigation) Act (1925), S. 10—Order under S. 10—Appeal—Civil P. C., S. 47.

An order made by the executing Court under S. 10, Indian Soldiers (Litigation) Act, cannot be regarded as an order falling under S. 47, Civil P. C. and therefore an appeal is incompetent. The High Court can however treat an appeal as a revision under S. 115, Civil P. C. and has power under that section to correct the orders made by the subordinate Courts on the basis that there has been material irregularity in the exercise of jurisdiction. [Para 2]

(b) Indian Soldiers (Litigation) Act (1925), S. 12—S. 12 does not give discretion but confers power.

Although the power under S. 12 is couched in permissive terms, the word 'may' is used not to give a discretion but to confer the power. The intention of the section is that when there is doubt in the mind of the Court as to whether or not the party before it is entitled to the privileges conferred by the Act, it is incumbent upon the Court to exercise the power conferred, i. e. it must make a reference to the prescribed authority which will produce the necessary certificate. The intention of the section is that where there is doubt concerning the point, whether the parties have led evidence in the case or not, such doubt shall be resolved not by a decision of the Court but by the certificate of the prescribed authority. Failure to do so is a material irregularity in the exercise of jurisdiction which attracts the revisional powers under S. 115, Civil P. C. [Para 2]

(c) Indian Soldiers (Litigation) Act (1925), S. 10 (2) as amended by Ordinance No. 64 of 1942—Application to set aside sale—Limitation.

Where an order of sale is made the proper course for the judgment-debtor is to apply under S. 10 to have the order set aside within 90 days of the order or of his gaining knowledge concerning it, and once time has begun to run against him in relation to that order, it cannot be arrested, notwithstanding that he was a serving soldier. [Para 3]

Case referred:—

1. ('39) 26 A. I. R. 1939 Lah. 405 : I. L. R. (1939) Lah. 116 : 184 I. C. 846, Firm Wasti Ram Gurditta Mal v. Mt. Ganeshi.

Gian Singh Tulli—for Appellant.

Narinder Singh—for Respondent.

Judgment.—The facts of the case out of which this appeal arises are as follows. On 26-2-1940 one Diwan Chand was granted an *ex parte* decree against one Fazal Elahi, on the basis of a mortgage for recovery of the mortgage debt by sale of the mortgaged property, which was a house. Execution was started on 11-8-1942 and on the following day a notice was issued to

the judgment-debtor under O. 21, R. 66, Civil P. C., returnable on 24-10-1942. The notice was returned with a report to the effect that Fazal Elahi had refused service on 4-10-1942. The Court accordingly directed that the house should be sold, but before this direction could be carried out, on 3-12-1942, a letter was received from the Collector of the district to the effect that Fazal Elahi was serving as a sepoy in the Army, and consequently the Court proceeded under S. 6, Soldiers (Litigation) Act, 1925, and at the same time sent a notice to the Officer Commanding the Unit in which Fazal Elahi was serving, requesting that if he thought fit he might certify as provided by S. 7. No certificate having been received within three months of the issue of the notice under S. 6, the Court on 26-3-1943 recommenced the execution proceedings and ordered that the house be sold, and the sale was actually effected on 28-4-1943 in favour of the decree-holder. On 22-4-1943, the Officer Commanding the judgment-debtor's Unit forwarded a petition by Fazal Elahi dated 19-4-1943, which set out that the petitioner had learnt that auction sale of his house had been ordered for 28-4-1943, that he had sent previous applications asking for suspension of the proceedings till the end of the war, on the ground that he was a serving soldier, and was unable to defend the case personally and he repeated the request for postponement, saying that if the house was sold, he would lose greatly. In consequence of this application, proceedings for confirmation were suspended and once again notice was sent to the prescribed authority to certify as provided by S. 7, if the authority thought fit. Having waited for a period of over three months, on 12-10-1943, the Court recommenced the execution proceedings and on that day it confirmed the sale. Fazal Elahi then on 17-2-1944 made an application under S. 10 of the above mentioned Act, asking that the sale should be set aside on the ground that he was a serving soldier on the material dates, and had only learnt of the sale on 26-1-1944 when he returned home on leave. He stated in the application that he would furnish a certificate as to the fact of his being a serving soldier. The executing Court allowed this application and set aside the sale as well as all subsequent proceedings. On appeal the learned Senior Subordinate Judge of Gujranwala held that there was insufficient material on the record to justify the finding that the judgment-debtor was serving under war conditions, when the orders were made which he sought to have set aside. Fazal Elahi has come up to this Court in second appeal, and seeks restoration of the order of the executing Court.

[2] It is contended on behalf of the respon-

dent Diwan Chand that the order made by the executing Court under S. 10, Soldiers (Litigation) Act, could not be regarded as an order falling under S. 47, Civil P. C., and therefore an appeal is incompetent. In support of this argument a Division Bench judgment of this Court published in A.I.R. 1939 Lah. 405¹ was cited, where also a petitioner had moved, ostensibly under S. 47, Civil P. C., to have a sale set aside which had already been confirmed by the executing Court on the ground that the petitioner, who was not a judgment-debtor under the decree, was an independent owner of a share in the property sold. It was held that an objection could not be taken under S. 47, Civil P. C., to an execution sale, after it had been confirmed. No authority to the contrary was cited by the learned counsel for the appellant and it would seem that the learned Senior Subordinate Judge was in error in entertaining and deciding the appeal before him. Power to set aside an order of confirmation is provided, in all cases of this kind, by an independent statute, namely S. 10, Soldiers (Litigation) Act, and that statute does not provide for any appeal from an order made in the exercise of such power. It seems to me, however, that the case is one in which, under S. 115, Civil P. C., this Court has power to correct the orders made by the Subordinate Courts, on the basis that there has been material irregularity in the exercise of jurisdiction. Neither of the Courts below made use of the power provided by S. 12, Soldiers (Litigation) Act, to resolve the doubt relating to the question whether at the material times, Fazal Elahi was serving under war conditions. The first Court proceeded on the basis that several notices had been issued by the Court to Fazal Elahi's Commanding Officer and Fazal Elahi had himself made two separate applications for stay of the proceedings on the ground that being a serving soldier he could not attend. The executing Court found itself unable to penalise the judgment debtor for the default on the part of his Commanding Officer "or bind him with the proceedings of sale which he had no opportunity to challenge earlier." This is, however, an inferential finding based upon certain indications relevant to the fact in issue, namely, whether on the material dates Fazal Elahi was a serving soldier, which could at the best only be regarded as fragmentary. The learned Senior Subordinate Judge on the other hand thought that a conclusion favourable to the judgment-debtor could not be drawn directly from the failure of his Commanding Officer to furnish the requisite certificate, and held that it was wrong to suppose that such officer was bound to issue such a certificate in every case, and the possibility was not excluded

that in the case before the Court, the Commanding Officer had not thought it proper to issue the certificate, "as, in his opinion, no postponement of the proceedings was desirable." The learned Senior Subordinate Judge further thought that the "mere sending applications for stay of proceedings was not enough" and holding that the executing Court had failed to record a finding that Fazal Elahi was serving under war conditions or special conditions on the material dates, concluded that action under S. 10 could not be taken for setting aside the orders complained of. Here again the finding is inferential and the learned Senior Subordinate Judge has also ignored the fact that there are several letters on the record sent by or on behalf of the judgment-debtor, showing that he was actually a sepoy with a given number in an M. T. T. Group, which was posted at one time at Kharian in the Gujrat district, at another time at Jhelum and later at Delhi. Section 12 of the Act is designed to meet just such cases where there is doubt in the mind of the Court as to whether an Indian soldier was or was not serving under war conditions at any particular time; in such a case, the Court "may refer the point for the decision of the prescribed authority, and the certificate of that authority shall be conclusive evidence on the point. Although the power is couched in permissive terms, I feel no doubt that the word 'may' is used not to give a discretion but to confer the power, and in view of the fact that the whole purpose of the Soldiers (Litigation) Act is to confer a benefit upon certain members of the community, that is, soldiers who serve the community in time of war, there seems to be little doubt that the intention of S. 12 is that when the case arises, i. e., when there is doubt in the mind of the Court as to whether or not the party before it is entitled to the privileges conferred by the Act, it is incumbent upon the Court to exercise the power conferred i. e., it must make a reference to the prescribed authority which will produce the necessary certificate. It is true that S. 12 contains no words to indicate that the Court is without capacity to decide the matter in the ordinary way on the basis of the evidence led by the parties, but having regard to the strong provisions that a certificate by the prescribed authority shall be "conclusive evidence on the point", it seems to me that the intention of the statute is that where there is any doubt concerning the point, whether the parties have led evidence in the case or not, such doubt shall be resolved not by a decision of the Court but by the certificate of the prescribed authority. It was pointed out that although Fazal Elahi in his application had promised to furnish such a certificate himself, he never did so. This is not

material to the proceedings. It is necessary for the Court to take action under S. 12 in case there remains a doubt in its mind, but the party affected may perhaps feel that the evidence already on the record is sufficient to clear all doubts against him. I have already shown that both the Courts below preferred to resolve the relevant doubt by resorting to inferences in the absence of evidence, which the parties apparently chose not to lead. The proper course for each Court was to refer the matter for a certificate under S. 12, and their failure to do so is in my view a material irregularity in the exercise of jurisdiction which attracts the revisional powers of this Court under S. 115, Civil P. C. I have accordingly treated this appeal as a revision under that section, and acting under S. 12 have myself made a reference to the prescribed authority whose reply is that on the material dates, *viz.*, 28-4-1943 when the auction sale took place, and 12-10-1943 when the sale was confirmed, the judgment-debtor, who is described as sepoy No. 964894 (I. A. O. C. No. 6832705), had not been granted any leave and was present with his Unit. This description makes it clear that Fazal Elahi was a person subject to the Indian Army Act 1911, and consequently was an 'Indian soldier' for the purposes of the Act. It is argued that there was no proof that he was serving under special conditions or war conditions, but it seems to me impossible to deny from the fact that he remained with his Unit when it was posted at three different places widely separated from each other, that he was serving with a Unit which was "for the time being mobilised," i. e., prepared for movement and ordered from place to place for service as required in time of war. There is no proof that this Unit was under orders to proceed on active service, but there seems reason to doubt that it was available for service at any place in India during the relevant period, and it is common knowledge that at that time, active hostilities were proceeding on Indian soil. Consequently, I feel no hesitation in allowing in favour of Fazal Elahi that on the dates when his house was sold by auction and the sale was subsequently confirmed, he was an "Indian soldier" serving under war conditions.

[3] It was next argued that the application was not brought within the prescribed period of limitation. Advantage was sought to be taken of the fact that Fazal Elahi had refused service of the notice under O. 21, R. 66, Civil P. C., on 4-10-1942, but it is obvious that from this single circumstance, it is impossible to deduce knowledge that these proceedings had culminated in a sale and ultimate confirmation of the sale, in view firstly of the fact that Fazal Elahi made repeated applications through his Commanding Officer for

suspension of the proceedings, and could not have been unaware that they had in fact been suspended, apart from which it is common knowledge that in execution proceedings sales do not ordinarily follow promptly upon service or refusal of a notice under O. 21, R. 66, Civil P. C. In many cases the interval of time is several years. It was stated by the learned counsel for the decree-holder that Fazal Elahi had actually appeared before the Debt Conciliation Board in Gujrat on 17-12-1943 in pursuance of the application made by him for conciliation of his debts, and on that date Diwan Chand had also appeared and stated for the information of the Board that the sale of Fazal Elahi's house in his favour had been confirmed. Even if 17-12-1943 be regarded as the starting point of limitation, the period of ninety days allowed by sub-s. (2) of S. 10 (as amended by Central Ordinance No. 64 of 1942, which was then in force) had not expired when Fazal Elahi made his application on 17-2-1944. Finally, it was argued that Fazal Elahi could not apply to have the sale set aside, for by his application of 19-4-1943, he had shown awareness of the fact that an order of the Court directing that his house should be sold had already been made, and that the sale was fixed to take place on 28-4-1943. The execution sale is not an "order" of the Court, but may be assimilated to, as being a direct consequence of, an antecedent order directing such sale. Consequently, it must be held that Fazal Elahi was aware of the sale long before 17-4-1944, and his application made on the latter date was out of time in relation to the order dated 26-3-1943, to which the sale should be regarded as being assimilated. The proper course for Fazal Elahi was to apply under S. 10 to have the order of the later date set aside, within ninety days of the order, or of his gaining knowledge concerning it, and once time has begun to run against him in relation to that order, it cannot be arrested, notwithstanding that he was a serving soldier. Support for his argument was also sought in the fact that by the amendment of sub-s. (2) of S. 10 effected by Ordinance No. 64 of 1942, the exclusion from the period of limitation of such time, lapsing between the order and the application, during which the soldier was serving under special conditions, was abolished. It was argued that the application could only be regarded as within time *qua* the order confirming the sale and that was the only order which could be set aside. Mr. Gian Singh Tulli was unable to make any reply to this final argument which is, in my view, well founded and I accordingly set aside the order of the lower appellate Court and restore that of the executing Court with the modification that the only proceedings in pursuance of the order for sale which

are set aside are the proceedings relating to confirmation of the sale, and accordingly, there is no need for the issue of a fresh warrant of sale, but the petitioner Fazal Elahi will be at liberty to take such proceedings as are provided by law and be advised to take, for the purpose of having the sale set aside. The parties are left to bear

their own costs in this Court as well as in the lower appellate Court. Costs in the executing Court will be costs in the case. The parties will appear in the executing Court for further proceedings on 9.6.1947.

D.S.

Order accordingly.

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